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No. 85-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANDREW LEONI AND HOUSTON SLATE,
Appellants,

v.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, in bar disciplinary proceedings involving lawyers' advertisements that were neither inaccurate nor deceptively phrased, the First Amendment permits a state to impose a penalty solely on the basis of the fact that a small number of atypical consumers were in fact confused or frightened when they read these advertisements.

2. Whether, in such disciplinary proceedings, the state's power to impose a penalty is augmented merely because, after the fact, the bar and the court can conceive of additional disclosures or disclaimers that could have minimized the number of consumers who were confused by the advertisements.

3. Whether two specific "omissions" found by the court below provided a valid alternate basis for disciplinary action, where the lawyer/advertisers had no way of knowing, in advance, that either of the omitted statements was required.

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Appellee.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellants Andrew Leoni and Houston Slate seek review of a decision of the California Supreme Court which ordered that they be publicly reprimanded for a series of mailings they distributed to persons who might be in need of their legal services.[1]

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 39 Cal. App. 3d 609, and is reprinted here as Appendix A. The findings of the Review Department of the State Bar are in Appendix B. The findings of the Hearing Panel are in Appendix C.

JURISDICTION

This is an appeal from a final order disciplining two attorneys for a series of mailings to potential clients. Appellants contend that Rule 2-101 of the Rules of Professional Conduct of the California State Bar may not constitutionally be applied to their conduct. The California Supreme Court decided this case on August 22, 1985 and denied a petition for rehearing on September 25, 1985.

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[1] The names of all parties in the proceeding below are included in the caption of the case.

See Appendix D. A notice of appeal was filed in the California Supreme Court on December 20, 1985. See Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985). 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of the Rules of this Court, the Attorney General of California was served with three copies of this jurisdictional statement.

STATUTORY PROVISIONS

Rule 2-101 of the Rules of Professional Conduct of the California State Bar provides, in relevant part:

> RULE 2-101. PROFESSIONAL EMPLOYMENT.
>
> This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.
>
> Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.
>
> (A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:
>
> (1) Contain any untrue statement; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or
>
> (4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or
>
> (5) State that a member is a certified specialist unless the member holds a current certificate as a

specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgement by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Rule 7-103 provides:

RULE 7-103. COMMUNICATING WITH AN ADVERSE PARTY REPRESENTED BY COUNSEL.

A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

STATEMENT

Appellants Andrew Leoni and Houston Slate appeal from a decision of the California Supreme Court, dated August 22, 1985, which ordered that they be reprimanded for violating several of the Rules of Professional Conduct of the State Bar of California. The charges centered on a series of solicitation letters and informational enclosures mailed out by appellants on a large-scale basis over a two-year period, which the Bar alleged to be "mislead-

ing" and unduly "intrusive." The core of the Bar's complaint was not that these mailings were *phrased* improperly, but that, in practice, they caused confusion and fear on the part of a few atypical recipients.

Appellants are partners in a law firm practicing bankruptcy law in Southern California. In 1978, they began a program of mailing letters and informational enclosures to persons facing legal action for the collection of debts. The recipients of these mailings, who ultimately numbered about 250,000 over a two-year period, were identified through inspection of public court records and legal listings in local newspapers. Some were simply defendants in small civil actions for money damages, while others had had either requests for default judgments filed against them or writs of execution issued against them.

Although the letters varied depending on the category of recipient involved, they typically explained to the recipients that they might need legal advice if they were not already represented by counsel, and contained an offer to advise recipients on their pending cases free of charge. They also generally explained the possible consequences of failure to take appropriate action, such as execution, garnishment, and foreclosure. A representative letter, received by several of the individual complainants below, is set out in the margin.[2] Others are reprinted in the appendix. App. 65a.

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[2] [Slate & Leoni Letterhead]

INFORMAL LETTER

FROM: SLATE AND LEONI
TO: VALERIE J. KEEN SIMS.

14703-COM MARCH 15, 1979

Court records reflect that you are being sued and the plaintiff in this lawsuit has asked the Court for judgment against you. We assume this has come about because of unexpected and unplanned circumstances.

First, let me tell you that our law firm does NOT represent this creditor. Slate and Leoni does NOT want any money out of you.

The informational enclosures also took a variety of different forms. *See* App. 68a. Most of them described Chapter 13 of the Bankruptcy Code [3]—explaining the procedures and benefits of this option and offering the services of appellants' firm in the event that the option was selected. Where appropriate, appellants also included enclosures discussing in more detail the procedures involved with writs of execution, garnishment, etc.

The purpose of this letter campaign was twofold. One purpose, of course, was commercial. Appellants obtained

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Slate and Leoni is NOT trying to collect money from you. We have nothing to do with this lawsuit.

They have sued you, and according to the Court files, are asking the Court to order judgment against you. After judgment is ordered, the next step is to have the Court issue a writ of execution against you. This is a Court order, ordering the Marshall or Sheriff to levy on your assets, car, bank account, etc.

We recommend this problem be taken care of right away, before you are hit with a judgment. There are various ways of handling the problem, depending on circumstances.

Again, Slate and Leoni does NOT represent the creditor that wants money out of you. We have nothing to do with them. We are writing to tell you about the oncoming judgment, and to suggest you protect yourself.

You may have your own lawyer, and if so, we suggest you consult with him or her, and get advice as to what to do. If you don't have your own lawyer, feel free to telephone this office and we will answer your questions. There is no charge for this. The telephone number is 623-8158.

Very truly yours,

SLATE and LEONI
A Professional Corporation

By: /s/————————————.

[3] By filing under Chapter 13, a debtor can stop enforcement efforts by creditors and arrange to make a flat monthly payment on all his debts, calculated on the basis of what he can afford to pay. After these payments are made over a limited period of time, generally 36 months, all further obligations are released. *See* 11 U.S.C. § 1322.

approximately one client in their bankruptcy practice from every 100 letters sent. But there was another purpose as well. Appellant Slate had long been concerned that the average low-to-middle income person with debt problems was simply being lost in the system without real access to legal advice. This concern was reflected in the fact that in 1978, after the letter program began on a trial basis, appellant sent copies of model letters and information sheets to the President of the California State Bar and all members of the Board of Governors. He asked them to initiate a similar educational program on a statewide basis, asserting that the task of ensuring access to legal advice for low-income persons with debt problems "is a job that *only* that State Bar of California can handle." The President of the Bar wrote back, saying that the matter would be forwarded to the Bar's division on legal services for a report, and concluding "I commend you on your efforts and good intentions."

This was the last communication received by appellants from the Bar until, two years later, they were notified that disciplinary proceedings had been instituted against them. These proceedings were based on the fact that the Bar had received complaints from seven of the 250,000 recipients of the letters. These complaints fell into two main categories: (1) cases where recipients were already represented by counsel and the letters caused them to worry that their interests were not being adequately protected, and (2) cases where the letters, although accurate, did not fit well with the particular circumstances facing the recipient.

Based on these kinds of occasional problems, and the general nature of appellants' letters, the Bar alleged a number of different violations of its Rules of Professional Conduct.[4] At the lowest level of the process—the hearing

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[4] Under California procedures, bar disciplinary matters are heard initially before a hearing panel of referees, who make a recommen-

panel—the allegations were that appellants had done the following: (1) improperly solicited business in violation of Rule 2-101(B); (2) communicated with a party already represented by counsel in violation of Rule 7-103; (3) made untrue statements in violation of Rule 2-101 (A)(1); (4) made deceptive or confusing statements in violation of Rule 2-101(A)(2); (5) omitted necessary facts in violation of Rule 2-101(A(3); and (6) communicated in a manner involving intrusion, coercion or harassment in violation of Rule 2-101(A)(6).[5] The hearing panel upheld all of these charges, with the exception of the allegation of omission of necessary facts, and made no reference whatever to the appellants' First Amendment defense.[6] App. 47a-61a. The panel voted 2-1 to recommend that appellants be suspended from practice for 30 days, with suspension stayed on the condition that appellants certify that they had discontinued their letter program. App. 61a. On a petition for rehearing, this discipline was reduced to public reproval.

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dation to the Bar's Review Department. The Review Department, in turn, makes a final recommendation to the California Supreme Court, which enters the final sanction. *See* Cal. Bus. & Prof. Code §§ 6077-6087.

[5] The relevant rules are set out above, under the heading "Statutory Provisions."

[6] Appellants' First Amendment arguments were thoroughly briefed and argued before the hearing panel. *See, e.g.*, Tr., July 12, 1982, at 93 ("to attempt to impose discipline or to prohibit a . . . program based on certain individuals' reaction appears to me to be constitutionally wrong"). The constitutional defense then became the basis for the votes of some of the dissenting referees in the Review Department. App. 44a-45a. The First Amendment, in turn, became the central focus of appellants' brief in the California Supreme Court. *E.g.*, Brief at 1 (case "concerns the extent to which the First Amendment protects letters sent by attorneys to persons who have been named as defendants in civil actions"). As we discuss *infra*, the court below rejected these constitutional arguments explicitly.

On appeal, the Bar's Review Department upheld the panel's factual findings, but drew quite different legal conclusions. It dropped the charges of improper solicitation and communication with a party represented by counsel. It retained the conclusions that appellants had communicated deceptively and through intrusion or harassment. App. 32a, 35a, 37a, 39a-43a. Unlike the hearing panel, it found two instances of omission of necessary facts, App. 41a-42a, and it added a wholly new charge—violation of Rule 2-101(A)(4) by sending a communication that fails to "indicate clearly, expressly or by context" that it is a message concerning the attorney's availability for employment, App. 42a. Overall, the Review Department concluded that appellants' high-volume letter campaign, in which they made reference to the status of the recipients' legal problems, inherently created a "high probability for error" and thus "constituted a reckless disregard" of appellants' obligations under Rules 2-101(A)(1), (2) and (3). App. 42a-43a. The majority of the referees voted to restore the sanction of suspension with execution stayed. App. 43a-45a.

On a petition for review, the California Supreme Court modified these conclusions only slightly. First, it affirmed the charge of deceptive communication under Rule 2-101(A)(2). In so doing, it relied not on any specific statements in appellants' letters but on their use of a basic "format" involving personalized references to the lawsuits faced by recipients. The court concluded that a letter campaign of this kind "was almost certain to cause panic and to mislead the recipients." App. 20a. For similar generalized reasons, the court affirmed the charge of communication through intrusion, coercion or harassment under Rule 2-101(A)(6). Here again, without examining what appellants specifically said, the court held that *any* letters directed at defendants in lawsuits were "bound to cause panic and fear in the lay recipients." App. 21a.

The court did make certain findings about the content of some of the mailings. It ruled that appellants had violated Rule 2-101(A)(4) by failing to state *expressly* in their letters that their message concerned their availability for employment. App. 21a. And it affirmed the charge of omitting necessary facts under Rule 2-101 (A)(3), based on the particular letters which stated that there was a $60 filing fee for Chapter 13 bankruptcies without adding that lawyers' fees were additional.[7] App. 20a-21a.

The court rejected appellants' First Amendment defense. In so doing, it cited the general precedents authorizing regulation of misleading or deceptive commercial speech, and then simply asserted that each of the findings of misconduct in this case met the criteria for regulation. In its constitutional analysis, the court gave no weight to the fact that any persons who were confused by the letters were only a small percentage of the total group of recipients, many more of whom found the letters beneficial. Nor did it consider whether appellants had any way of knowing, in advance, that the rules would be interpreted to require them to add an "advertisement" label to their mailings or to discuss their own fees whenever they mentioned the filing fee for Chapter 13. The court did reduce the sanction to a reprimand, in part because of appellants' repeated efforts to revise the letters to remove any possible misleading passages. App. 22a.

Three justices dissented in part. Justice Kaus stated that he could not vote to affirm the charge concerning

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[7] The court reversed the finding of untrue statements under Rule 2-101(A)(1), based on the fact that no statement in the letters was false. App. 21a-22a. Indeed, before the hearing panel, the State Bar conceded that there is "no allegation in the Notice to Show Cause accusing Mr. Slate and Mr. Leoni of having inaccurate information in their letters. That simply is not an issue in the case." Tr., June 23, 1982, at 73-74.

failure to label the letters a solicitation of clients. In his view, the letters "fairly trumpet [appellants'] availability for professional employment." App. 29a. Justice Grodin wrote that, in his view, the First Amendment requires some showing of intentional or negligent violation of the rules in this kind of case. App. 26a. He added that no written communication should be considered to violate Rule 2-101(A)(6) with its ban on intrusion, coercion or harassment. App. 27a. Finally, Chief Justice Bird agreed with both of the other Justices, and added that, in her view, it was hardly misleading for appellants to fail to spell out their fee for legal representation. As she put it, "Few, if any, lay persons are likely to assume that lawyers work free of charge." App. 23a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In a series of landmark First Amendment decisions, this Court has struck down state bar disciplinary rules prohibiting lawyers from advertising their prices, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), advertising through direct mail, *In re R.M.J.*, 455 U.S. 191 (1982), and advertising by means of substantive legal advice directed at persons with a particular legal problem, *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985). This case presents the issue that must inevitably arise in the wake of these rulings—whether state bars that remain hostile to advertising by lawyers will be able to continue suppressing protected commercial speech through vastly overbroad case-by-case *application* of general disciplinary rules that are facially unobjectionable.

The particular rules applied here proscribe, in the most general terms, "misleading," "intrusive" and "coercive" forms of lawyers advertising. Oddly lacking from the court's discussion, however, is any real focus on why the actual language used by appellants met these standards.

Instead, the court simply emphasized repeatedly that a small percentage of consumers who received the letters were, in fact, confused or frightened. It then added the assertion that, in view of the "massive" scale of the letter campaign, some such reactions were inevitable. The exact path by which the court moved from these factual assertions to its decision to discipline petitioners is not altogether clear. There are two related but distinct ways in which the opinion can be understood. Either approach, however, would have a devastating impact on protected forms of commercial speech.

First, the court may have been adopting the straightforward, albeit extreme, view that if lawyers engage in advertising, they are responsible for any predictable confusion or "panic" that they cause to even a single consumer. Such a reaction, when it occurs, would automatically render the advertisement "misleading" and/or unduly "intrusive." If this is what the court meant, it took a position flatly inconsistent with the rulings in *Bates* and *Zauderer*, which specifically rejected the notion that categories of advertisements may be banned as deceptive simply because they will foreseeably confuse a few people.

Alternatively, the court below may have meant to introduce an additional factor into the governing test. Its opinion can be read to suggest that appellants were penalized because (1) their letters caused minor injuries to a few readers, and (2) they did not do everything possible to minimize those injuries. Under this standard, liability for occasional confusion or "panic" would hinge on whether a court, after the fact, can think of alternative ways of phrasing an advertisement that could have made it less "confusing" or "frightening" to those few consumers who misunderstood it. This standard, while seemingly somewhat less restrictive, would in practice amount to the same thing as requiring that advertising never confuse or frighten a single person. When cases are viewed ret-

rospectively, there is always some further disclosure or disclaimer that an advertiser *could* have included. As a result, no lawyer could safely engage in any form of advertising that creates any risks of misunderstanding on the part of even one consumer. As we have noted, however, that is exactly the result this Court ruled out in *Bates* and *Zauderer*.

I. A State May Not Penalize an Advertisement that is Neither Misleading Nor Frightening to the Average Person, Based Merely on the Fact that a Small Number of Atypical Recipients Were Confused or Frightened.

The main tenor of the decision below is that lawyers who advertise are responsible for foreseeing, and preventing, every single instance of confusion or undue "panic" on the part of consumers exposed to their message. As this Court has recognized on at least two occasions, such a rule—suppressing a beneficial flow of information to consumers to protect a small minority—simply cannot be squared with the First Amendment. One can speculate that the court below arrived at its rather startling position because it was seeking a way to penalize a particular type of advertising—direct-mail solicitation of persons with particular legal problems—that it disliked but knew it could not ban altogether. In fact, however, the effects of the court's ruling will reach far beyond that particular context. In California at least, many protected forms of commercial discourse have now been put at risk.

The *text* of the rules applied below is not controversial. The State clearly has the power under the First Amendment to ban speech that is "false, deceptive, or which tends to confuse, deceive or mislead the public." Rule 2-101(A)(2); *see Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. at 2275; *In re R.M.J.*, 455 U.S. at 202. And it also has the power to bar advertising techniques that involve "intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."

Rule 2-101(A)(6); *see Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). This is not, therefore, a case like *Bates*, *R.M.J.*, or *Zauderer*, where state bar rules, on their face, intruded on protected commercial speech.

The problem here is the application of the rules authorized by the court below. Put simply, the court disciplined appellants not because any particular statement they made was deceptive or unduly "intrusive" or "coercive" but because a few readers were in fact confused and frightened. Such a standard must be examined carefully if the constitutional protections accorded to commercial speech are to be taken seriously. After all, the power to label speech as "misleading" can be a potent weapon for suppressing controversial forms of expression. Under this Court's governing test, most restrictions on commercial speech must directly advance a substantial state interest in the least restrictive possible way. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). But "misleading" speech is automatically unprotected. *Id.*

To understand the potential impact of the California Supreme Court's interpretation of the applicable disciplinary rules, it is important to look at the facts of this case in some detail. Appellants' advertisements were directed at persons known, from court or newspaper listings, to be involved in some form of litigation in which they were accused of not paying a small debt. The letters and enclosures described certain legal consequences that could occur if a defendant failed to take appropriate action, and then suggested the possibility of a debt consolidation under Chapter 13 of the Bankruptcy Act. The letters made it clear that appellants had merely drawn the recipient's name from a list, and thus had no special knowledge of that person's case. Moreover, the letters expressly noted that the recipient might have his own lawyer handling the matter, and urged him or her to

rely on the advice of that lawyer. The discussion of possible outcomes was both entirely accurate and phrased carefully in terms of what *could* happen if proper steps were not taken. There was no suggestion that such events were inevitable, or that appellants were the only persons who could prevent them.

Nevertheless, appellants were accused of "misleading" and "panicking" the public because the "format" of their letter was deemed "bound" to confuse some recipients and a few actual complaints were received. These complaints fell into two main groups. First, there were several recipients who already had their own counsel and reacted to appellants' letters by feeling concern about whether their lawyers were adequately protecting their interests.[8] Second, a few of the recipients had legal situations that did not fit the norm and they, therefore, say that they drew conclusions about their cases that were not valid.[9] The State Bar and the court below determined that these occasional problems rendered the letters "deceptive" and "intrusive" within the meaning of the disciplinary rules, even though (1) the letters were far more

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[8] In designing the letter program, appellants found it impossible from a practical point of view, to exclude all recipients already represented by counsel.

[9] For example, in one case, appellants' letter informed a recipient that there was a motion for default judgment filed against him. This was true, but the motion had been withdrawn by stipulation the day before the letter was sent. App. 11a-12a.

In another case, a letter went to a judgment-proof corporation. That corporation's parent had previously determined that it could safely avoid paying the judgment at issue. However, because of appellants' general discussion of writs of execution, the parent company drew the conclusion that its assets might be attached and decided to pay the judgment. App. 8a-9a.

As noted above, even as to these atypical recipients, the court below found nothing *false* in the letters. App. 21a-22a.

often helpful rather than confusing,[10] (2) any confusion was almost certain to be ended as soon as a recipient consulted any lawyer,[11] and (3) there probably was no way, in a program of this type and magnitude, to anticipate and prevent every possible instance of consumer misunderstanding.

Facts of this kind should serve to make clear the extent of the dangers raised if states are given a free hand in defining, and then suppressing, "misleading" or "intrusive" commercial speech based on the reactions of a small minority of recipients. When advertisements are distributed on a large scale, almost any statement made is likely to confuse some person, either because he is peculiarly susceptible to confusion or because the statement does not apply to his own particular circumstances. The power to ban advertisements on this basis would thus eviscerate First Amendment protections for broad and important categories of lawyers' advertising. Indeed, because there are many general statutes and rules proscribing "misleading" advertising outside the legal context, the ruling below poses a threat to other forms of commercial speech as well.[12]

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[10] One out of a hundred recipients of the 250,000 letters actually retained appellants' firm for bankruptcy work. Five or six per one hundred recipients called and received free advice on their pending cases from appellants. App. 5a. Others presumably were motivated to retain their own counsel. The complaints received by the Bar numbered seven.

[11] The only actions even suggested by the letters were steps that could only be taken through attorneys.

[12] One can imagine a claim, for example, that an orange juice manufacturer engaged in deceptive advertising when it stated that its product was "healthful." Certainly, there must be a few people who, due to allergies or other atypical characteristics, cannot drink orange juice and remain healthy. One such person might rely on the advertisement and injure himself by consuming the product, but that would hardly make the advertisement itself "misleading." *Cf. Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984) (rejecting argument that liquor advertising is "misleading" because it associates the product with

This Court has not been unaware of this danger. On the contrary, it has been careful to reject the notion that advertisements which are phrased accurately and nondeceptively may be banned based simply on the reactions of a few consumers. First, in *Bates v. State Bar of Arizona*, *supra*, the Court upheld advertising of the price of certain standardized legal services in the face of the dissenters' argument that such advertisements could be "misleading" because the exact services to be provided might not be "clearly specified or understood by the prospective client." 433 U.S. at 373 n. 28. The Court acknowledged that some persons might be confused and decide to visit a particular lawyer based on their "misunderstanding." *Id.* However it refused to authorize prohibition of advertisements on this basis, noting that any confusion would usually be "exposed at the initial consultation." *Id.* The Court concluded that "[i]n light of the benefits of advertising" to the majority of persons, "*suppression is not warranted on account of the occasional client who misperceives his legal difficulties.*" *Id.* (emphasis added).

The Court in *Bates* also suggested the appropriate regulatory approach in cases where the content of an advertisement is not misleading on its face, but there is concern that an "occasional" reader will misunderstand it. It suggested that the state bar might dictate the particular services that must be included when a firm advertises the price of a particular package like an "uncontested divorce." *Id.* And speaking more generally, the Court stated that the bar might mandate specific disclosures in any area where there was a concern that advertisements would give an incomplete picture to lay readers. *Id.* at 375. In other words, the Court was willing to authorize some prospective regulation of a particular category of advertisements, in order to minimize confusion, even where such advertisements are not sufficiently "misleading" to be subject to prohibition. But it

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the "good life" rather than disclosing the harms that liquor causes to some people).

also made it clear that states may not go further, and suppress categories of advertisements, in pursuit of the goal of preventing every possible instance of consumer confusion.

This basic principle was reaffirmed last Term in *Zauderer*. There, the Court reviewed a state's decision to discipline an attorney who placed a newspaper advertisement that solicited consumers of a particular contraceptive device. The advertisement noted that the attorney had represented other consumers of that product in lawsuits against the manufacturer. 105 S. Ct. at 2271-72. One asserted basis for the state's action was the claim that the attorney had made a "claim to expertise" in these kinds of cases by mentioning his previous clients. *Id.* at 2276 n.9. The Court rejected this argument, stating that while the Constitution may allow states to ban explicit and unverifiable claims of expertise, it does not "permit a state to prevent an attorney from making *accurate* statements of fact regarding the nature of his practice merely because it is possible that *some readers* will infer that he has some expertise." *Id.* (emphasis added). Put differently, the states may not ban statements that are accurate and non-deceptive on their face merely because they know that some readers will react inappropriately. *See also In re R.M.J.*, 455 U.S. at 203, 205 (advertisement banned as deceptive must be "inherently misleading" or "misleading on its face").

In fact, this same principle necessarily underlies the Court's broader holding in *Zauderer* that states may not prohibit all lawyer advertisements containing substantive legal advice. *See id.* at 2276-80. Such a holding depends on the assumption that occasional confusion is an insufficient basis for suppression, since *any* advertisement that contains a substantive legal discussion and is widely distributed is virtually certain to confuse some lay person. Indeed the advertisement at issue in *Zauderer* serves to make this clear. Another portion of the advertisement urged former contraceptive users not to "assume

it is too late to take legal action." *Id.* at 2271. The resulting risk of confusion is apparent. After all, some users of the device who read the advertisement must have been time-barred in their claims under any theory. Such persons might well have been led to visit a lawyer unnecessarily,[13] or, as was alleged here, to "panic" at the thought that advice received from their own counsel had caused them to sleep on their rights. Moreover, the advertisement might well have confused readers who had used similar products and drew the false conclusion that they too had some potential legal claim.

These concerns were not enough, in *Zauderer*, to justify a flat ban on substantive advertisements because the Court concluded that the constitutional balance favors the large majority of consumers who will benefit from substantive legal advertising. It follows that similar concerns about a few confused consumers should not be enough, in this case, to justify a penalty on appellants. Their letters were not, as we have explained, phrased in a way that would deceive or "panic" the average reader. As a result, even if they caused occasional and temporary harms to a few people, they remained constitutionally protected. As this Court stated in *Bates*, occasional confusion caused by an accurate advertisement is a problem that a state can attack only in a more limited fashion—through mandated disclosures or disclaimers.[14] The court below, by ignoring the rulings of this Court, has adopted

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[13] *See id.* at 2296 (O'Connor, J., concurring in part and dissenting in part) ("When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement.")

[14] We note, in this regard, that the State Bar itself has set out four examples of "communications" that are presumptively misleading. These four are advertisements containing testimonials or warranties, along with solicitations made at the scene of an accident or to persons in an unstable mental state. Board of Governors Standards Adopted May 25, 1979. No rules applicable to appellants' type of mailing have been adopted.

an approach that will lead to far greater limits on commercial speech than the First Amendment permits. This error requires correction.

II. Advertisements That Are Not Misleading or Unduly Intrusive in Themselves Do Not Become Subject to Prohibition Merely Because a Court Can Conceive of Additional Disclaimers or Disclosures that Would Have Helped to Reduce the Likelihood of Occasional Consumers Being Confused or Frightened.

As we suggested at the outset, it is possible to read the decision below as embracing a slightly less extreme rule than that just discussed. Rather than holding advertisers responsible for any confusion or "panic" caused to consumers in every case, the court may have meant to say the following: where any such harm occurs, the advertiser will be held responsible *if* the court, after the fact, can conceive of changes in the language of the advertisement that would have helped to solve the problem.[15] If this was indeed the court's intention, this rule must be rejected as well. While it formally provides advertisers with slightly more protection than a rule requiring them to prevent all harms in every case, its practical effects will be the same because there is no way that an advertiser can assure himself, in advance, that he has provided every disclosure or disclaimer that others might suggest after the fact.

We note, at the outset, that this Court has already implicitly rejected, in *Bates*, the proposition that advertisements can become "misleading" and therefore unprotected merely by virtue of the fact that better phras-

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[15] We base this possible interpretation on the court's stated willingness to approve future advertising campaigns containing suitable "disclaimers or clarifying language." App. 2a, 22a. Of course, in saying this, the court may only have meant to preserve the theoretical possibility of an advertisement that was so well phrased that it would satisfy the standard discussed in section I—*i.e.*, neither confuse nor frighten even a single consumer.

ing could have lessened occasional consumer confusion. There, as we have discussed, the Court refused to allow a state to prohibit, as misleading, advertisements by lawyers that, for example, offered to handle any "uncontested divorce" for a set price. The Court acknowledged that some persons might be confused, but held that this was not enough to justify a prohibition. It is clear, however, that the advertisement in question could have been improved in a number of ways that would have helped to reduce the potential for confusion. It might, for example, have stated that property or custody arrangements were not included in the stated fee. Nevertheless, this obvious possibility for improvement was not sufficient in *Bates* to transform an advertisement that was nondeceptive on its face into one that was subject to suppression.

To be sure, as we have discussed, the Court in *Bates* did acknowledge that states have the power to mandate disclosures and disclaimers that might reduce consumer confusion. But such disclosures and disclaimers must be mandated in advance.[16] A state may not simply announce a general rule that says: "The Bar will punish any attorney who publishes an advertisement which the Bar subsequently determines could have been improved by certain disclosures and disclaimers." Such a rule would be so vague as to violate both the Due Process Clause and the First Amendment.

It is fundamental to our system of government that persons may not be punished for violating a law that is so vague that they cannot know what conduct is required. *E.g.*, *Kolender v. Lawson*, 103 S. Ct. 1855, 1858 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09

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[16] The Court last Term in *Zauderer* reaffirmed its approval of any mandated disclosures that are "reasonably related" to the protection of consumers. 105 S. Ct. at 2282. It explained that such rules impose little burden on advertisers, while serving the interest of consumers in receiving more information. *Id.*

(1972). This doctrine has several purposes. It serves both to ensure "fair warning" to individuals, and to prevent "arbitrary and discriminatory enforcement" by providing explicit standards to the relevant authorities. *Id.*; *see Kolender v. Lawson*, 103 S. Ct. at 1858. And in some cases, there is still a third concern. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,'" its inevitable effect is to deter citizens from engaging in protected expressive activity. *Grayned v. City of Rockford*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). Vagueness causes people to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. at 372 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The force of these fundamental principles is well illustrated by the rule proposed here. First, it can hardly be said that advertisers receive "fair warning" if the governing rule instructs them to minimize confusion to consumers and they are then held responsible whenever, after the fact, a court can think of some editorial change that would have done the job better.[17] Moreover, such a standard clearly opens the way to "arbitrary and discriminatory enforcement." *Cf. Zauderer, supra*, 105 S. Ct. at 2290 n.10 (Brennan, J., concurring in part and dissenting in part). There is every reason to suspect that after-the-fact second-guessing of advertising texts will be most common in those cases where the type of advertisement used is controversial. Indeed, that is apparently what occurred here. The tone of the opinion below makes

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[17] Justice Grodin, concurring and dissenting below, put it best: "The philosopher-lawyer Jeremy Bentham characterized as 'dog law' a system in which a person has no way of knowing that he is doing something wrong until he is punished for it." Pet. App. 25a.

it clear that the court, unlike courts in other states,[18] simply has not reconciled itself to the fact that direct-mail advertising techniques by lawyers are constitutionally protected. This same hostility to written solicitations is reflected, in turn, in the disciplinary rules of the State Bar, which seek to minimize the use of such means of communication by banning them in every case that they are not ruled to be constitutionally protected. Rule 2-101(B).

But the most troubling aspect of a standard that hinges disciplinary action on the ability of a court to conceive of useful disclosures or disclaimers after the fact is the resulting burden on protected speech. Under *Bates* and *Zauderer*, truthful and nondeceptive commercial speech remains constitutionally protected even if it confuses or harms a few atypical consumers. But by requiring the *optimal* disclosures and disclaimers, and determining what is optimal only *after* some consumer injury occurs, a state can effectively prevent anyone from publishing any advertisement that could conceivably confuse or frighten even one person. Would-be advertisers simply will not be able to assure themselves that they have included every conceivable disclosure or disclaimer. Under such circumstances, few lawyers would willingly risk disbarment by becoming the next "test case." And other commercial advertisers will feel similar restraints. In sum, the ultimate effect of this standard will be no different from a flat requirement that advertisers avoid confusing or frightening anyone—*i.e.*, a far greater intrusion on protected speech than this Court authorized in *Bates* and *Zauderer*.

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[18] *See, e.g., In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 105 S. Ct. 2701 (1985) (direct-mail solicitation of accident victims constitutionally protected); *In re Application for the Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981) (direct-mail solicitation of products-liability plaintiffs constitutionally protected).

III. Neither of the Two Specific "Omissions" Found Below Provided an Adequate Basis for Penalizing Petitioners.

In view of the discussion presented so far, it should be clear that the two specific "omissions" found below do not provide a valid alternative basis for the court's decision. The court did not, by any means, spell out all of the specific disclosures that would have been required for appellants to avoid disciplinary action. It did, however, hold that two specific disclosures should have been made. In one case, it derived this disclosure requirement from an unforeseeable interpretation of a specific rule. In the other, it relied on no specific rule at all. Thus, far from providing a separate basis for the penalty entered below, these specific holdings only serve to illustrate the dangers of retroactively mandated disclosures.

First, the court concluded that appellants should have included a specific statement that their letters constituted an "advertisement." App. 21a. It is clear that such a requirement, if mandated in advance, would be perfectly acceptable. *See In re R.M.J.*, 455 U.S. at 206 n.20 ("a lawyer could be required to stamp 'This is an Advertisement' on the envelope"). The problem is that the California rules did not impose such a requirement. On the contrary, Rule 2-101(A)(4), on which the court purported to rely, specifically authorized the omission of such a statement whenever it is clear "by context" that a letter constitutes a message concerning the sender's availability for professional employment. Faced with this rule, the court below simply concluded that the "context" here was not clear enough, App. 21a—despite the stated views of two other justices that the commercial purpose of the letters was quite obvious.[19]

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[19] App. 29a (Kaus, J., concurring and dissenting) ("petitioners' communications fairly trumpet their availability for professional employment"); App. 23a (Bird, C.J., concurring and dissenting) ("The context of these letters, written on law firm stationery and inviting the recipient to call for a free initial con-

In view of this fundamental disagreement about what was suggested by the "context" of a given set of letters, it can hardly be said that appellants had sufficient notice, in advance, that their conduct would violate the rule. Instead, the court below erected what amounts to a new *per se* requirement of an explicit "advertisement" label, and then penalized appellants for violating that new requirement. As the court put it, a " 'clear' indication to laypersons that a message concerns availability for professional employment is required and the rule could easily be satisfied by a statement such as 'This is an advertisement.' " App. 21a. Unfortunately, appellants had no way to know that this particular phrasing was required.

A similar problem is raised by the court's conclusion that it was a deceptive omission for appellants, in their enclosures describing Chapter 13, to state the amount of "cash" that would be required for the court filing fee, without describing the amount of attorneys fees that a client would be required to pay. App. 20a-21a. As we have noted, there is nothing wrong with penalizing advertisers under general rules barring deceptive advertising where they make statements that are, on their face, misleading. This was not, however, such a case.

Appellants had a specific reason for setting out the filing fee. They were addressing persons who had serious debt problems and might be looking for a way out. Such persons would naturally be concerned that the judicial process itself might be practically unavailable to them because of the need to raise sufficient "cash." Attorneys' fees, by contrast, were not to be paid up front, so there was less reason to discuss them.[20] More importantly,

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sultation, must have suggested strongly to most lay persons that petitioners were available for employment after that consultation.")

[20] Appellants typically would charge Chapter 13 clients $600 spread over ten monthly payments of $60.

appellants had no reason to think that by explicitly discussing the court "filing fee," they were leading anyone to believe that there would be no additional legal fees. No complainant in fact drew that conclusion.[21] And, as Chief Justice Bird put it below, "Few, if any, lay persons are likely to assume that lawyers work free of charge." [22] App. 23a. In sum, here again, the court penalized appellants, not for sending out mailings that were deceptive on their face, but for their failure to anticipate a disclosure that the court later deemed useful.

CONCLUSION

For these reasons, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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[21] One complainant's attorney suggested that this might be the implication. But even his own client did not draw the conclusion that appellants would work for free. App. 9a.

[22] We note, in addition, that just as with the price advertising in *Bates*, any confusion here would be cleared up at the initial consultation. See 433 U.S. at 373 n.28.

APPENDICES

APPENDIX A

SUPREME COURT OF CALIFORNIA

L.A. 31851

ANDREW LEONI AND HOUSTON SLATE,
Petitioners,

v.

THE STATE BAR OF CALIFORNIA,
Respondent.

[Filed Aug. 22, 1985]

BY THE COURT

What is the standard for determining whether a lawyer's solicitation of clients by mass mailings and informational pamphlets is misleading? We are asked to address this issue in our review of a recommendation of the State Bar that petitioners, Andrew Leoni and Houston Slate, be suspended from the practice of law for 30 days because their letter program—the mailing of some 250,000 letters and informational enclosures—allegedly violates the misleading or deceptive communications prohibition of Rule 2-101(A) of the Rules of Professional Conduct of the State Bar.[1]

Petitioners contend that this regulation both on its face and as applied, violates the constitutional guarantee

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[1] Unless otherwise indicated, all references to Rules or Rule refer to the Rules of Professional Conduct of the State Bar and portions thereof.

of freedom of speech.[2] The American Civil Liberties Union Foundation of Southern California (ACLU), amicus curiae on behalf of petitioners, argues that at issue is the proper standard for determining what constitutes misleading attorney advertising and solicitation; in addition it argues that in the case at bench the evidence is insubstantial to support the State Bar's findings. The ACLU further contends that in failing to make specific findings of violations and in recommending discipline for violations beyond those initially charged, the State Bar failed to comply with the requirement of due process of law.

We analyze petitioners' letter program under the line of cases according qualified protection to commercial speech and examine the cases and policies which govern misleading advertising generally. We hold that Rule 2-101(A)'s content-based regulations of misleading advertising are facially constitutional. Examining petitioners' letter campaign, we conclude that the letters are misleading and that, therefore, Rule 2-101 is also constitutional as applied. Given that this is an evolving area of law, we further conclude that suspension is inappropriately harsh and instead impose public reprimand to be served by this opinion. As for the letters, we conclude that the preferred and least restrictive constitutional remedy is to require petitioners to insert disclaimers or add clarifying language rather than total prohibition.

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[2] The California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, 2, subd. (a).) We base the analysis equally on this provision, although throughout this opinion we will refer to the First Amendment to the United States Constitution which provides that "Congress shall make no law . . . abridging freedom of speech."

I. *The Slate & Leoni Letter Program*

Petitioners Houston Slate[3] and Andrew Leoni[4] are attorneys licensed to practice law in California. They practice under the name of Slate & Leoni, a professional corporation organized under California law. At all times relevant to this proceeding the practice of Slate & Leoni was exclusively before the federal bankruptcy courts.

In 1978, after studying the United States Supreme Court's decision in Bates v. State Bar of Arizona (1977) 433 U.S. 350, (first amendment protects attorney advertising of prices at which routine legal services will be performed), Slate & Leoni began sending letters to certain defendants regarding legal aspects of debt problems. The letters informed the recipients of the procedural aspects of the case pending against them, as well as the legal rights and remedies of debtors. Slate & Leoni recommended that the recipient consult an attorney—his or her own or Slate & Leoni.

The recipients were defendants in small claims or municipal court actions or were owners of real properties which were in foreclosure. The names and addresses of the recipients were obtained by employees of Slate & Leoni at first and later by a private consulting firm using public records of judicial proceedings in the Los Angeles County courts and listings in public newspapers.

Between November 1978 and July of 1980, 83 different versions of the letters and informational enclosures were sent to approximately 250,000 recipients. The type of letter and enclosure received depended on the type of defendant (business or nonbusiness) and the procedural stage of the case against the defendant. Mailings

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[3] Slate was admitted to practice law in California on January 8, 1947.

[4] Leoni was admitted to practice law in California on June 19, 1946.

were sent to defendants against whom: (1) civil complaints for money had been filed; (2) unlawful detainer actions had been filed;[5] (3) civil complaints for personal injury and property damage had been filed; (4) requests to enter default had been filed in collection actions; (5) writs of execution had been issued; and (6) writs of execution had been served. The letters did not identify the name or court number of the pending case. Instead, Slate & Leoni marked the letters with in house filing numbers.

In addition to the letters, Slate & Leoni enclosed various informational pamphlets which were prepared by petitioner Slate. One letter, "Money Problems?" was included in virtually all of the correspondences. A second pamphlet, "How to Pay Debts Under Court Protection" was included in correspondences with individuals against whom civil complaints for money had been filed, requests to enter default in collection actions had been filed, and writs of execution had been issued or served. This pamphlet describes a chapter 13 bankruptcy, although the word "bankruptcy" is not mentioned in the pamphlet. In cases where a writ of execution had been issued against a defendant, a third enclosure, "What is a Writ of Execution?" was also included. A fourth enclosure, "If You Are in Business and You Are Facing A Writ of Execution," and a fifth enclosure, "Is Your Business Having Money Flow Problems?" were sent to business defendants against whom a writ of execution had issued. Additional enclosures included "Order for Debt Relief," "The Consolidation Plan," and "How to Get a Release of a Garnishment on Your Pay-Check [sic]."

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[5] The letters to defendants in unlawful detainer actions were discontinued sometime around 1978 or 1979. In his deposition, petitioner Slate explained that this was done because the firm concluded that most defendants had personal, and not financial, disputes with their landlords.

Slate & Leoni transmitted roughly 2,000 letters per month initially in 1978 and transmitted roughly 10,000 letters per month by 1980. The firm obtains at least one client for every 100 letters sent out and approximately 25 percent of the firm's chapter 13 (of the Bankruptcy Act) filings are attributable to the letter program. Chapter 13 cases reflect a portion, the extent of which is not clear from the record, of petitioners' law firm business. As the letters indicate, the lawyers will answer questions regarding the cases or mailings free of charge. Mr. Slate estimated that the office receives 5 or 6 callers per 100 letters whose questions are answered free of charge. Additionally, the enclosure "Money Problems, Lawsuits? Here are Some Suggestions" lists a telephone number where the recipient can call and listen to a recorded explanation of how a bankruptcy works. The parties stipulated that the letter program is designed, in part, to generate paying clients. Because the exclusive practice of the firm was in federal bankruptcy court, the firm would not charge a client unless there was an actual filing in the bankruptcy court. Additional services were performed without charge such as calls to negotiate with creditors and assistance with preparation of in pro. per. filings for state court proceedings.

There are numerous letters and enclosures in the record because Slate & Leoni revised their materials. For instance, the initial version of the enclosure "What is a Writ of Execution?" stated that "if you have $1,000 in a certain type of account in a *savings and loan association*, it cannot be seized by the officer." Because a husband and wife could not each have $1,000 in such an account, Slate & Leoni voluntarily changed the enclosure because they "wanted it to be exactly true and have nothing that might mislead somebody."

In January 1979, Mr. Slate wrote to the president of the State Bar of California outlining the letter program

and enclosing samples of some of the letters which were actually sent. He requested that the State Bar undertake the letter program to provide information to persons who appear to be in need of legal assistance with their debt problems. The president thanked Mr. Slate for his letter and good intentions and forwarded the proposal to the Legal Services Division of the State Bar.

Two years later, on February 3, 1981, disciplinary proceedings were commenced by the State Bar on the complaint of members of the bar and the public concerning letters received.

II. *State Bar Proceedings*

The disciplinary proceedings began with a notice to show cause which charged petitioners with willful violations of Rules 2-101 and 7-103. Five violations were alleged: (1) unlawful solicitation of business in violation of Rule 2-101(B);[6] (2) communication with parties represented by counsel on the subject of that representation in violation of Rule 7-103;[7] (3) use of untrue statements in violation of Rule 2-101(A)(1), use of statements,

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[6] Rule 2-101(B) states:

"No solicitation or 'communication' seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or 'communication' specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or 'communication' is protected from abridgement by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client. Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients."

[7] Rule 7-103 states: "A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the

or arrangement of statements in a manner or format, which was false, deceptive, or tended to confuse, deceive or mislead the public in violation of Rule 2-101(A)(2), omission of necessary facts in violation of Rule 2-101 (A)(3), and transmittal of communications in an objectionable manner in violation of Rule 2-101(A)(6).[8] The two remaining counts—interference with the administration of justice and misrepresentations to judicial officers—were dismissed by the State Bar examiners for lack of evidence.

At the proceeding before the Hearing Panel of the State Bar, the parties entered into a stipulation regarding the details of the letter program and the complaints received by the State Bar. Petitioner Slate was the only witness who actually testified. His deposition was also admitted into evidence.

Slate explained that internal filing numbers (and not the official court number) were printed on the letters so that the Slate & Leoni attorneys could retrieve informa-

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express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body."

[8] Rule 2-101(A) states in part:

"A 'communication' is a message concerning the availability for professional employment of a member or a member's firm. A 'communication' made by or on behalf of a member shall not:

"(1) Contain any untrue statement; or

"(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

"(3) Omit to state any fact necessary to make the statement made, in the light of the circumstances under which they are made, not misleading to the public or

".....

"(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct."

tion about the case from their own files if a recipient called or came into the office. He also explained that the word "bankruptcy" was not used in the enclosures because he felt it was misleading. The public, Slate explained, usually thinks of a "straight" chapter 7 bankruptcy. Additionally, he noted that the word "bankruptcy" is not used in the new 1979 Bankruptcy Code. He further stated that he omitted the term because he did not want people to think the firm was pushing them into a bankruptcy when, in actuality, that is the last remedy the firm recommends. Finally, because the letters were sent at a time when few lawyers were familiar with the new Bankruptcy Code, Slate explained that one purpose of the letters was to inform the recipients' attorneys about chapter 13 proceedings. The citation to 11 United States Code section 1322 was included in the letters to assist the recipients' lawyers rather than the recipients.

The parties stipulated that seven complaints had been received and that there may be other instances involving similar facts. The hearing panel largely adopted the facts from the stipulation and concluded that the letters and enclosures were communications for the purpose of seeking professional employment for pecuniary gain in violation of Rule 2-101(B).

Findings as to the seven complaints were also made. One business recipient, Sitelines, Inc., is a California corporation wholly owned by a Delaware corporation, Guardian Industries. Sitelines was a defendant in a suit by its creditors and was represented by Mr. Greenberg, a California attorney. Judgment was entered against Sitelines and Greenberg determined that the corporation was judgment proof and so advised his client. In August 1980 Sitelines received petitioners' letter which referred to a chapter 13 bankruptcy, which is not available to corporations. Sitelines forwarded the letter to Guardian Industries whose officers determined that their assets could be attached. Contrary to Mr. Greenberg's advice,

Guardian Industries paid the judgment. The hearing panel concluded that because Sitelines' or Guardian's assets could not be attached and because of the reference to chapter 13 bankruptcy, the letter contained material which was "false, deceptive, or which intended to confuse, deceive or mislead" in violation of Rule 2-101(A)(2). Because Greenberg appeared as attorney of record in the court file, the panel further concluded that petitioners communicated with a party whom they knew, or constructively knew, was represented by counsel upon a subject of controversy in violation of Rule 7-103.

A second attorney, Mr. Roman, was also provided with a copy of petitioners' letter by his client. The client, Ms. Russo, received the enclosure "Order for Debt Relief" which stated: "FILING FEE: The cash money that you need to apply for an ORDER FOR DEBT RELIEF is sixty dollars. This one filing fee protects both husband and wife." The attorney (but apparently not the client) believed that the letter implied that the total cost of the service would be $60 and that the proposed plan referred to something other than a bankruptcy filing. When Mr. Roman called petitioners' office, an attorney explained that the plan could be a Chapter 11 or 13 bankruptcy and that in addition to the $60 filing fee, 10 additional monthly payments for $60 would be charged. The hearing panel concluded that the letter and enclosures contained matter which was false, deceptive, or which tended to confuse, deceive or mislead because the service would not be provided for $60 and because the word "bankruptcy" was not disclosed by petitioners.

William Wagstaff was a defendant against whom a motion for summary judgment had been filed. His attorney, Mr. Jordan, filed an opposition to the motion. Prior to the hearing, Wagstaff received petitioners' letter which upset him and caused him to believe his attorney was not actively protecting his interests because he interpreted the letter to mean that he was a candidate for

bankruptcy. The hearing panel found that petitioners communicated with a party represented by counsel in violation of Rule 7-103. They also found that the letter contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101 in that, contrary to the facts, the letter falsely suggested that the natural result of the civil action would be an adverse judgment and execution upon Wagstaff's assets.

Fidela Parayno was served with a summons and complaint for specific performance. She retained an attorney, Mr. Tarr, who filed an answer on her behalf. In February 1979, she received petitioners' letter and was placed in fear of imminent loss of personal property. She also questioned Mr. Tarr and he had to convince her that he was adequately protecting her interests. The hearing panel concluded that the letter was sent in violation of Rule 7-103 and that it was false, deceptive or tended to confuse, deceive or mislead in that it suggested that an adverse judgment would be rendered and Parayno's assets executed upon.

Jerrell Main was a defendant against whom a judgment of approximately $59,000 had been entered. In July 1980, he voluntarily paid $42,000 to his creditor pursuant to a stipulated payment schedule. In July 1980, he received petitioners' letter and enclosures which indicated that a writ of execution had issued against him. He became extremely upset. The hearing panel noted that plaintiffs never executed pursuant to a writ and none of Main's property was ever attached (but made no finding as to whether a writ had in fact issued).[9]

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[9] As noted by the ACLU, the State Bar's findings are confusing. Apparently, a writ had in fact issued. As will be discussed more fully, this court may take judicial notice of matters in a civil action underlying the charges against an attorney in disciplinary proceedings (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 444).

They concluded that the letter contained matter which was false or deceptive, or which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2). It was further found that the letter was transmitted in a manner involving intrusion or threats in violation of Rule 2-101(A)(6).

Valerie Sims was an employee of Norman Levine. At his request she rented an automobile for him and he subsequently refused to pay the charges. Sims was sued by the rental car company and decided to allow judgment to be entered against her and seek subrogation from Levine. Judgment was entered against her in February 1979. She sued Levine in February and settled the matter before trial. In March 1979, Sims received a letter which was mailed to her place of employment. Her new employer read the letter and became upset about the possibility of garnishment of wages. Sims telephoned petitioners and informed a secretary that the letter was inaccurate and that petitioners should not contact her because she considered the letter to be an invasion of privacy. A few weeks later, a second letter was sent to Sims' residence. Her husband saw the letter and became angry because he thought his wife had lied to him about the lawsuit. The hearing panel concluded that the letter contained matter which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2) and that the letter was transmitted in a matter involving intrusion, coercion, duress, compulsion, intimidation, threats or vexacious or harassing conduct in violation of Rule 2-101(A)(6).

Daisy of California, a California corporation, was sued and Daisy's attorney filed an answer in Los Angeles Municipal Court in May 1978. On November 28, 1978 the parties entered a stipulation in the court file, taking plaintiff's motion for default off calendar. Petitioners sent Daisy a letter, dated November 29, 1978, which Daisy's president interpreted as meaning that plaintiff

was still seeking a default judgment and that something had occurred in the case of which he was unaware. The hearing panel concluded that the true status of the action was not as represented in the letter and the letter contained matter which was false or deceptive, or which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2).

The hearing panel recommended by a two-to-one vote that petitioners be suspended from practice for thirty days with execution of suspension stayed on the condition that petitioners certify that they had discontinued their letter program. The dissenting referee believed that public reproval was sufficient discipline. On rehearing, the discipline was reduced to public reproval by a two-to-one vote with the requirement that petitioners' letter program cease. No findings or conclusions were made on petitioners' claim that the letter program was protected by the First Amendment.

The Review Department of the State Bar Court adopted the findings of the hearing panel; however, it reached different legal conclusions. It dropped the Rule 2-103 charge of improper solicitation and the Rule 7-103 charges of improper communication with a party represented by counsel. It retained the conclusions of violations of Rule 2-101(A)(2) and (6).

The review department found four additional violations. It found that petitioners omitted necessary facts and violated Rule 2-101(A)(3) in two instances. First, the letters failed to state that the relief proposed required a filing under the Bankruptcy Act and second, the letters failed to state that such filing would require attorney's fees in addition to the $60 filing fee. The review department also found that petitioners violated Rule 2-101(A)(4) which prohibits communications which "[f]ail to indicate clearly, expressly or by context" that they are messages concerning the attorney's availability for pro-

fessional employment. Finally, the review department found that the letter program, which involved up to 10,000 letters per month, involved a high probability for error and that the statements regarding the status of the case were added to inject an element of urgency to induce the recipient to the "desired action." Because of what the review department described as "almost inevitable inaccuracies" they found petitioners acted in reckless and willful disregard of their duties under Rule 2-101 (A) (1), (2) and (3). Two of the three dissenting members of the review department expressed the view that the findings of fact were not supported by the evidence.

By an eight-to-five vote the review department recommended that petitioners be suspended from practice for 30 days with execution stayed and petitioners placed on probation upon certain conditions. Two of the five dissenting referees voted that petitioners' conduct was protected by the First Amendment. Two other dissenting referees voted that public reproval was sufficient discipline.

Petitioners contend that their letter program is entitled to the First Amendment protection accorded to noncommercial, and in the alternative to commercial, speech. The ACLU argues that the evidence is insufficient to support the findings of the State Bar and that because of procedural [10] defects the proceedings should be dismissed.

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[10] The ACLU contends that petitioners did not receive notice of the alleged violations of Rule 2-101(A) subdivisions (1) and (4) specifically. This contention is without merit. Although due process requires that findings of violations be based on charges initially brought by the State Bar (see In re Ruffalo (1968) 390 U.S. 544, 551-552; Woodard v. State Bar (1940) 16 Cal.2d 755, 757), the notice to show cause charged petitioners with "wilfully violating Rules 2-101 and 7-103." This, in combination with the specific allegations in the nine-page Notice gave petitioners ample notice of the violations.

III. *Analysis*

In analyzing the context-and content-based restrictions in the case at bench, we engage in a threshold inquiry: is petitioners' letter writing program commercial or noncommercial speech? Petitioners contend that their letters, in particular the informational enclosures, are within the category of noncommercial speech. If so, content-based restrictions are valid only in narrow and limited situations. (See, e.g., Chaplinsky v. New Hampshire (1942) 315 U.S. 568 [fighting words]; Miller v. California (1973) 413 U.S. 15 [obscenity]; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 [libel].) With regard to solicitation by attorneys specifically, a " 'commonsense' distinction [has been made] between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation,[11] and other varieties of speech." (Ohralik v. Ohio State Bar Association (1978) 436 U.S. 447, 455-456.) (Compare Ohralik with In re Primus (1978) 436 U.S. 412 and NAACP v. Button (1963) 371 U.S. 415.)

Petitioners assert that the massive letter campaign should be analyzed as noncommercial speech and place primary reliance on this court's opinion in Jacoby v. State Bar (1977) 19 Cal.3d 359, in which we addressed the issue of First Amendment limitations upon state regulation of attorney solicitation. Although the analysis in *Jacoby* is instructive, petitioners mischaracterize the holding as controlling in this case.

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[11] That commercial speech is less protected than speech associated with core First Amendment concerns is illustrated by examining the overbreadth doctrine. Because of the heartier nature of commercial speech, the United States Supreme court has declined to extend the overbreadth doctrine "to professional advertising, a context where it is not necessary to further its intended objective." (Bates v. State Bar of Arizona (1977) 433 U.S. 350, 381.) Because we conclude that the speech involved in this case is commercial, petitioners can only challenge the rules as applied to them.

This court held in *Jacoby* that former Rule 2, a flat ban on solicitation of professional employment, "could not constitutionally be applied to prohibit an attorney from cooperating in the publication of a news article or broadcast on a newsworthy topic, even when the attorney himself is the subject." (Id., at p. 363.) Petitioners argue that this court articulated the following test for differentiating between commercial and noncommercial speech: "A communication is not 'primarily directed' toward solicitation unless, viewed in its entirety, it serves no discernible purpose other than the attraction of clients. If a legitimate purpose appears on the face of a publication or in the demonstrated motivation of an attorney, the publication must receive at least prima facie First Amendment protection." (Id., at p. 371.)

Petitioners' reliance is misplaced because as *Jacoby* involved an "as applied" challenge to a rule prohibiting all solicitation, the above quoted language articulated a test for generally determining the constitutional scope of former Rule 2's application. It did not articulate a test for determining when a message is entitled to the greater protection accorded noncommercial speech.[12]

The applicable analysis is set forth in Bolger v. Youngs Drug Products (1983) —— U.S. ——, 103 S. Ct. 2875, which addresses the distinction between commercial and noncommercial speech and concludes that the unsolicited letter campaign constitutes commercial speech. Youngs

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[12] Given that the United States Supreme Court has recognized that business entities enjoy the full panoply of First Amendment protection for their direct comments on public issues (Consolidated Edison Co. v. Public Service Commission (1980) 447 U.S. 530) we note that it would be not only unnecessary but also contrary to the policy of consumer protection to adopt petitioners' position because it would "grant broad constitutional protection to any advertising that links a product to a current public debate." (Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (1980) 447 U.S. 557, at p. 563, fn. 5.)

Drug Products was a corporation engaged in the manufacture, sale and distribution of contraceptives. It sought to mail on an unsolicited basis flyers promoting products available at drug stores, flyers promoting prophylactics and informational pamphlets discussing the prevention of venereal disease and the desirability of prophylactics in general or Youngs' products in particular.

The United States Supreme Court held that the mailings, in particular the informational pamphlets, were properly classified as commercial speech. Three factors were examined, all of which were found to be present: (1) it was conceded that the pamphlets were advertisements; (2) the pamphlets referred to a specific product and (3) Youngs had an economic motive for mailing the information. (Id., at pp. 2880-2881.)

The court noted that no one factor was determinative and that it was unnecessary for all three of the characteristics to be present in order for speech to be commercial. (Id., at pp. 2880-2881, fn. 14.) In the case at bench, two of the factors are present. The letters refer to specific services offered by Slate & Leoni (assisting debtors in resolving their financial difficulties) and the firm had an economic motive in sending the letters. On the facts, the pamphlets and letters involved in *Bolger* and those sent by petitioners cannot be distinguished. All are advertisements. We conclude, therefore, that petitioners' letter campaign must be analyzed pursuant to the commercial speech concepts.

A. *Regulation of Commercial Speech*

The extension of First Amendment protection to commercial speech announced in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel (1976) 425 U.S. 748 applies to regulation of advertising by lawyers. (Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio (1985) —— U.S. ——, 105

S.Ct. at 2265; In re R.M.J. (1982) 455 U.S. 191; Bates v. State Bar of Arizona (1977) 433 U.S. 350.) Lawyers are permitted to advertise the availability and terms of routine legal services (*Bates*, supra, at p. 384), to advertise by general mailings of announcement cards and to include in their advertisements lists of jurisdictions where they are licensed to practice and areas of specialization. (In re R.M.J., supra, at pp. 205-206.)

The State Bar does not argue that commercial speech is without First Amendment protection, but contends that the Slate & Leoni letters and pamphlets are misleading. Therefore the State Bar argues, it may invoke Rule 2-101(A)'s permissible content based restriction.

We agree and note that the First Amendment cases do not question the authority of the state to regulate misleading advertising. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976) 425 U.S. 748, the Supreme Court held that a ban on advertisements of prices of prescription drugs violated the First Amendment. In rejecting the argument that commercial speech was without First Amendment protection the court stated that "[i]f there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content." (Id., at p. 761.) The court specifically recognized that misleading advertising could be regulated, noting that "[o]bviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem." (Id., at p. 771.)

The principle that "[a]dvertising that is false, deceptive, or misleading . . . is subject to restraint" has been repeatedly affirmed in the commercial speech cases. (Zauderer, supra, —— U.S. at p. ——, 105 S.Ct. at p. 2278; Bates, supra, 433 U.S. at p. 383.) The United States Supreme Court has stated the principle in broad

terms: "The government may ban forms of communication more likely to deceive the public than to inform it [citations] or commercial speech related to illegal activity. [Citation.]" (Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (1980) 447 U.S. 557 at pp. 563-564.) In analyzing restrictions on commercial speech the Supreme Court has stated "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." (Id., at p. 566.) Limitations on an absolute ban, however, have been indicated. "Misleading advertising may be prohibited entirely . . . [but] the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive." (In re R.M.J., supra, at p. 203.)

Further, it has been noted that special considerations apply to advertising by lawyers because they "do not dispense standardized products; they render professional services of almost infinite variety and nature, with consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." (Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel (1976) 425 U.S. 748, 773, fn. 25.) This court analyzed the above quoted language in Jacoby v. State Bar (1977) 19 Cal.3d 359. Writing for the court, Justice Mosk explained that the footnote "stands for the proposition that while the First Amendment values in commercial advertising remain constant regardless of the profession involved, the governmental regulatory interest may vary from profession to profession." (Id., at p. 377.)

B. *Validity of Rule 2-101(A)*

Having determined that the state may prohibit misleading advertising, we turn to the specific question pre-

sented: May the State Bar prohibit the advertising campaign of letters and informational pamphlets which explain the status of the recipients' cases and debtors' legal rights and remedies?

As noted by the State Bar, an attorney seeking review of the review department's recommendation has the burden of demonstrating that the findings are not supported by substantial evidence or that the recommendation is erroneous or unlawful. (Bus. & Prof. Code, § 6083, subd. (c); Dixon v. State Bar (1982) 32 Cal.3d 728.) "In meeting this burden, the petitioner must demonstrate that the charges of unprofessional conduct are not sustained by convincing proof and to a reasonable certainty." (Himmel v. State Bar (1971) 4 Cal.3d 786, 794.)

Applying these well established principles to the case at bench we conclude that Rule 2-101(A) is a permissible regulation of misleading advertising. We further conclude that petitioners' massive advertising campaign which particularizes letters to the facts of the recipients' cases is misleading. In analyzing the letters, we are guided by the policy of consumer protection and examine the standard for misleading advertising as stated in Business and Professions Code sections 17200 and 17500 because of the statute's similarity to Rule 2-101.

Rule 2-101(A) is permissible because it regulates misleading advertising. That rule prohibits messages only if they (1) concern the availability for professional employment and (2) contain statements which are untrue, deceptive, which tend to confuse, deceive or mislead the public. This is virtually identical in scope to the prohibition contained in Business and Professions Code sections 17200 and 17500. Those sections prohibit "unfair, deceptive or misleading advertising" and have been interpreted broadly to embrace not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likeli-

hood or tendency to deceive or confuse the public. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211; Chern v. Bank of America (1975) 15 Cal.3d 866, 876; People ex rel. Mosk v. Lynam (1967) 253 Cal.App.2d 959, 966; 64 Ops.Cal. Atty.Gen. 782, 787 (1981).)

Rule 2-101(A) is also similar to the general consumer protection provisions of the Business and Professions Code, because an attorney may only be disciplined for willful breach of Rule 2-101(A) (or any of the Rules of Professional Conduct). (Bus. & Prof. Code, § 6077.) To establish willful breach it must be shown that the attorney acted purposely, that he knew what he was doing and that he intended to commit the act. Knowledge of the Rules is not an element of the offense. (Abeles v. State Bar (1973) 9 Cal.3d 603, 610; Zitny v. State Bar (1966) 64 Cal.2d 787, 792.) Similarly, the general advertising regulations of the Business and Professions Code may be violated even where there is no *specific* intent to deceive or mislead. (Chern v. Bank of America, supra, at p. 876.)

Having determined that Rule 2-101(A) permissibly regulates misleading advertising, we ask whether the rule is constitutional as applied to petitioners and conclude that the letters have a likelihood of misleading the public and actually did mislead members of the public. This massive advertising campaign which seemed to personalize letters to individuals named as defendants in pending lawsuits was almost certain to cause panic and to mislead the recipients. For example, the letter sent to defendants against whom a complaint for specific performance had been filed (e.g., letter to F. Parayno), is misleading in that it suggests that an adverse judgment is imminent and that the recipient's personal assets will be attached as a result of that judgment.

As for the violation of Rule 2-201(A)(3) (omission of facts necessary to make material not misleading), we

conclude that a violation occurred because the letters state that the recipients need $60 cash to apply for debt relief but fail to state that Slate & Leoni will also charge 10 times that amount in attorney fees. A necessary fact has been omitted and the rule violated.

We also conclude that the State Bar's finding of a violation of Rule 2-101(A)(4), failure to clearly identify the message as a communication for employment, is supported by the evidence. Although the letter can be interpreted by lawyers as indicating that it is a message concerning the firm's availability for professional employment, it does not clearly state that it is such. A "clear" indication to laypersons that a message concerns availability for professional employment is required and the rule could easily be satisfied by a statement such as "This is an advertisement."

The finding that the format in which petitioners presented their message involved intrusion, threats, intimidation, harassment or duress in violation of Rule 2-101(A)(6) is also supported by the record. Although transmission of commercial speech by mail appears to be entitled to constitutional protection and is not considered a significant intrusion on privacy (see Bolger v. Youngs Drug Products (1983) 103 S.Ct. at p. 2883; In re R.M.J. (1982) 455 U.S. 191, 206, fn. 20; Consolidated Edison Co. v. Public Service Commission of New York (1980) 447 U.S. 530, 541-542), the particularized, misleading and unsolicited letters mailed to defendants against whom cases were then pending was bound to cause panic and fear in the lay recipients.

Finally, we reverse the finding that the petitioners violated Rule 2-101(A)(1) (untrue statements). Although statements in the letters may be misleading none of the letters contain false or untrue statements. The State Bar's findings suggest that the letter to Jerrell Main falsely stated that a writ of execution had issued. This

was not a false statement; a writ of execution had issued against Main, a development of which he was unaware until receipt of the Slate & Leoni letter. This court may take judicial notice of such records where those proceedings are a basis for disciplinary action. (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 444; see fn. 10, supra.) The evidence does not support a finding that petitioners violated Rule 2-101(A)(1).

Guided by the policy of consumer protection against misleading advertising, we conclude that Rule 2-101(A)'s regulation of misleading advertising is constitutional on its face and as applied to petitioners' case. We note, however, that the rule cannot constitutionally be invoked to totally prohibit all future mass advertising which. due to disclaimers or clarifying language, is not false or misleading. We hope that the State Bar will assist its members in acting in accordance with the Rule rather than, as in the instant case, only initiating disciplinary proceedings. Although we strongly disapprove of petitioners' deceptive method of generating additional clientele, we find the 30 days' suspension recommended by the board to be excessive. The fact that petitioners have no prior disciplinary record is a factor in their favor (see Mrakich v. State Bar (1972) 8 Cal.3d 896, 907), as is the fact that petitioners made good faith efforts to modify the letters so as to make them truthful and not misleading. With these considerations in mind, we are satisfied that a public reprimand will constitute sufficient discipline. This reprimand is to inform petitioners that their individualized advertising campaign does violate Rule 2-101(A) and that the rule is constitutional on its face. This opinion shall serve as such reprimand.

CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I agree with Justice Grodin that an attorney may not be disciplined for conduct—or for omissions—which he or she could not reasonably foresee would be found to violate a rule. I write to observe that two other violations upheld by the majority fall within this category.

First, petitioners could scarcely have anticipated that it would be necessary to spell out that they charge fees for legal representation in order to avoid a rule 2-101 (A) (3) violation. (See maj. opn., *ante*, at p. — [typed maj. opn. at pp. 28-29].) Few, if any, lay persons are likely to assume that lawyers work free of charge. Though Russo's attorney claimed he believed that the $60 filing fee would cover attorneys' fees, evidently Russo himself was not so naive. (*Id.*, at p. — [typed maj. opn. at p.12].)

Second, the majority chastise petitioners for failing to identify their letters clearly as communications for employment. I agree that the letters could have been clearer about the scope of petitioners' practice and their availability for employment. Yet, the majority's solution —that the letters say "this is an advertisement"—is not one which petitioners could have divined from the rules. Rule 2-101(A)(4) allows attorneys to "indicate clearly, *expressly or by context*" that their communications concern availability for professional employment. The context of these letters, written on law firm stationery and inviting the recipient to call for a free initial consultation, must have suggested strongly to most lay persons that petitioners were available for employment after that consultation.[1]

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[1] The finding concerning rule 2-101(A)(4) suffers from a procedural flaw as well. Though the majority claims otherwise (maj. opn., *ante*, at p. —— [typed opn. at p. 18], fn. 10), I cannot find any allegation in the notice of violation that petitioners were charged with violating this rule. On the contrary, that notice refers

Furthermore, the majority's proposed message is no improvement. It is more misleading than the letter which was actually sent out. Petitioners were *not* available for employment in the state court proceedings in which the letter recipients were involved. Their practice was exclusively federal.

The majority's affirmance of these two unforeseeable "violations," I submit, will not motivate the State Bar to clarify its rules either through the adoption of standards under rule 2-101(D) or through advisory opinions. (Conc. and dis. opn. of Grodin, J., at p. — [typed opn. at pp. 2-3].) On the contrary, it suggests that such standards and opinions are unnecessary. I would urge the State Bar and the court to tread carefully in this area of constitutionally protected speech. Violations should be found only when it is clear that an attorney must reasonably have known that his conduct would lead to such a result.

BIRD, C.J.

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repeatedly to the letters as "communications regarding availability for employment" or as "solicitations" without ever suggesting that the letters might have been viewed otherwise by their recipients.

Even the State Bar's trial brief failed to mention this alleged violation. It would be impossible to deduce from the notice or from the brief that the letters "[f]ailed to indicate clearly, expressly or by context, that [they were] 'communication[s].'" (Rule 2-101(A)(4).)

CONCURRING AND DISSENTING OPINION BY GRODIN, J.

The philosopher-lawyer Jeremy Bentham characterized as "dog law" a system in which a person has no way of knowing that he is doing something wrong until he is punished for it.

I agree that rule 2-101(A), insofar as its application is called into question here, is valid on its face as a permissible means of protecting the public against false or misleading communications, or especially intrusive communications, by members of the State Bar seeking professional employment. The rule is broadly phrased, however, and reasonable people can differ as to its application in a particular case. Because communications by attorneys to prospective clients are within the ambit of the First Amendment (In re R.M.J. (1982) 455 U.S. 191; Koffler v. Joint Bar Association (1980) 432 N.Y.S. 2d 872 [412 N.E.2d 927]) and because rule 2-101(A), like other rules of professional conduct, is enforced through disciplinary proceedings which may lead to sanctions ranging from reproval to disbarment, the potential for the sort of "dog law" that transgresses upon constitutional principles is particularly acute.

The situation is analogous to the imposition of civil penalties (as distinguished from injunctive relief) for false or deceptive advertising (Bus. & Prof. Code, § 17500 et seq.). In People v. Superior Court (Olson) (1979) 96 Cal.App.3d 181, 195, the Court of Appeal, rejecting a requirement that the People prove knowledge of falsity or reckless disregard of the truth, held that the imposition of civil monetary penalties for the *negligent* dissemination of untruthful or misleading advertising does not offend the First Amendment. The court implied that a strict liability principle would be constitutionally objectionable.

I would hold that an attorney violates rule 2-101(A) only when he knows, or reasonably should know, that his communication is in violation of that rule. Such a standard should impose no undue burden upon the State Bar. It should, on the other hand, motivate the State Bar to adopt additional standards for the implementation of rule 2-101(A), as contemplated by the rules themselves.[1] It should also motivate the State Bar to provide some procedure for advising attorneys who are in genuine doubt as to whether their communication would violate the rules. See Koffler v. Joint Bar Association, supra, 432 N.Y.S.2d at p. 150.)

In this case, I agree with the majority that petitioners should have been aware that their mass mailing campaign, in the form of letters which purported to give particularized information to recipients engaged in litigation, would invariably mislead some,[2] and on that

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[1] Rule 2-101(D) provides in part: "The Board of Governors of the State Bar shall formulate and adopt standards as to what 'communications' will be presumed to violate subdivisions (A) or (B) of this rule 2-101." The standards which have been adopted to date declare a presumption of violation in communications which contain guarantees, warranties, or predictions regarding the result of legal action or testimonials about or endorsements of a member; communications delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel; and communications transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility.

[2] The letters to Sitelines, whose attorney had determined that it was judgment proof, and to Main, who had been making stipulated payments on the judgment taken against him, stated: "This creditor, who holds the judgment against you, has taken one more step, that maybe you do not know about. A writ of execution has been issued by the Court. This is a Court order, ordering the Sheriff to levy on your assets." While possibly accurate in the abstract, it was not so in either of these cases. It implied that the recipients' assets would be seized, and failed to note that such

ground I concur in the finding that petitioners violated rule 2-101(A)(2). I concur also with respect to the other violations except for the asserted violation of rule 2-101(A)(6), which prohibits transmission of communications "in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct." It seems quite clear from the language of the rule, as well as from the standards which the State Bar Board of Governors has adopted (see fn. 1, *ante*), that the rule is directed to the time, place, and manner of the communication rather than to its substance. Consequently, I do not believe that communication by mail can be said to violate that rule. In Koffler v. Joint Bar Association, supra, 432 N.Y.S.2d 872, the New York Court of Appeals rejected the bar association's claim that it was necessary to prohibit mail solicitations in order to protect privacy and prevent

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seizure would occur only if the creditor asked the sheriff to execute the writ. Officers of the corporation were misled to the actual injury of the corporation, and Main was understandably upset by the implication that notwithstanding his compliance with the stipulation the creditor was about the seize his assets.

The letter to Wagstaff, whose attorney had opposed the creditor-plaintiff's summary judgment motion, recited that the plaintiff had asked the court "to order judgment against you. After judgment is ordered, the next step is to have the Court issue a writ of execution against you. This is a Court order, ordering the Marshal or Sheriff to levy on your assets, car, paycheck, bank account, etc. [¶] We recommend this problem be taken care of right away, before you are hit with a judgment." The clear implication of the language was that unless the recipient took some unspecified action beyond that which his attorney had taken, a judgment would be entered against him and his assets seized.

The letters to Parayno, whose attorney had filed an answer to the creditor's complaint, used the same language and conveyed the same implication. In the Sims case the language was the same. In that case, since judgment had been taken, and the record does not reflect that it had been paid, the inaccuracy was minor, but the implication that her assets were in danger of seizure was not.

"overbearing persuasion." The court held that these factors "which could conceivably be present in telephone solicitation . . . are not sufficiently possible in mail solicitation to justify banning it. As the Supreme Court put it in Consolidated Edison Co. v. Public Serv. Comm. [447 U.S. 530, 542-543], a recipient of a lawyer's letter 'may escape exposure to objectionable material simply by transferring . . . [it] from envelope to wastebasket.' It is not enough to justify a ban that in some situations . . . a solicitation letter may be offensive to the recipient, or that some people may fear receiving a lawyer's letter. . . ." I agree.

GRODIN, J.

CONCURRING AND DISSENTING OPINION BY KAUS, J.

I agree fully with the majority opinion, except as to one minor point: I do not think petitioners were charged with facts which would constitute a violation of rule 2-101(A)(4), nor do I believe that such a violation was proven. It seems to me that petitioners' communications fairly trumpet their availability for professional employment.

This minor difference of opinion in no way affects my agreement with the discipline imposed.

KAUS, J.

APPENDIX B

STATE BAR COURT
THE STATE BAR OF CALIFORNIA

81-O-102 LA

IN THE MATTER OF

ANDREW LEONI and HOUSTON SLATE

A Member of the State Bar

I, Judy Duffield, hereby certify that I am Manager of the Court Clerk's Office of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of the minutes of the meeting of the Review Department held in San Francisco, California on June 16, 1983, insofar as they relate to the above-entitled proceeding.

This matter previously having been submitted, after discussion and consideration of the matter by the Review Department and upon motion made, and seconded and adopted, it was

RESOLVED that the Review Department hereby adopts findings of fact as follows:

"FINDINGS OF FACT

1. Respondent Houston Slate was admitted to the practice of law in the State of California on January 8, 1947.

2. Respondent Andrew Leoni was admitted to the practice of law in the State of California on June 19, 1946.

3. Respondents Slate and Leoni were at all relevant times engaged in the practice of law under the name of "Slate and Leoni," which firm is a professional corporation organized under the California laws relating to professional corporations.

4. Commencing in or about November of 1978, Respondents instituted a "letter program" consisting of the transmittal of direct mailings to particular individuals, regarding specific cases or matters in which those individuals were then involved. Respondents have continued their "letter program" at all times subsequent to November of 1978, and until the present.

5. Each of the individuals to whom Respondents' letters were sent were either named defendants in Small Claims or Municipal Court civil actions, or were owners of real property which was in foreclosure.

6. The names and addresses of certain of the individuals to whom Respondents' letters were sent were obtained by Respondents, their agents or employees, from records of public judicial proceedings on file in the Los Angeles County Municipal and Small Claims Courts.

7. The names and addresses of others of the individuals to whom Respondents' letters were sent were obtained by Respondents, their agents or employees, from public newspapers listing property owners against whose homes notices of default had been filed with the Los Angeles County Recorder.

8. Between in or about November of 1978, and in or about July of 1980, and continuing thereafter, Respondents caused their agents or employees to regularly monitor the status of civil collection ac-

tions, unlawful detainer actions and personal injury and property damage actions filed in the Los Angeles County Municipal and Small Claims Courts. As a result of said monitoring process, Respondents' agents or employees would obtain the names and addresses of named defendants against whom:

a. Civil complaints for money had been filed;

b. Unlawful detainer actions had been filed;

c. Civil complaints for personal injury and property damage had been filed;

d. Requests to Enter Default had been filed in collection actions;

e. Writs of Execution had been issued; and

f. Writs of Execution had been served.

9. Some of the letters referred to above failed to identify the particular judicial proceeding involving the particular recipient of the letter by reference to the particular branch or judicial district in which the judicial proceeding was pending, or by reference to the actual case or file number which the particular proceeding was assigned. Each of said letters did, however, contain a reference number which was a temporary identification number. Respondents caused said temporary identification number to be included for the purpose of maintaining their office record of the letter sent. As a result, some of said letters were presented or arranged in a manner or format which tended to confuse, deceive or mislead, in wilful violation of Rule 2-101(A)(2), Rules of Professional Conduct ("Rules").

10. In addition to the content of the various letters described herein, Respondents also caused an enclosure or enclosures to be included with each

letter sent. The inclusion of a particular enclosure or number of enclosures was dependent upon the type of action or matter involved and/or upon the stage of the particular proceeding at the time the letter was sent.

11. One such enclosure is entitled "Money Problems?" Said enclosure was included with virtually all letters sent by Respondents.

12. A second such enclosure is entitled "How To Pay Debts Under Court Protection." Said enclosure was included with letters sent to individuals against whom civil complaints for money had been filed, to individuals against whom Requests to Enter Default had been filed, and to individuals against whom Writs of Execution had been issued or served.

13. A third such enclosure is entitled "What is a Writ of Execution?" Said enclosure was included with the letters sent following the court's issuance of a Writ of Execution.

14. A fourth such enclosure is entitled "If You Are In Business—and You Are Facing a Writ of Execution?" Said enclosure was included with letters sent following the court's issuance of a Writ of Execution, to recipients who were business defendants.

15. A fifth such enclosure is entitled "Is Your Business Having Money Flow Problems?" Said enclosure was also included with letters sent following the court's issuance of a Writ of Execution to recipients who were business defendants.

16. During the period of time immediately following the inception of Respondents' letter program, in or about November of 1978, the volume of letters transmitted by Respondents was roughly 2,000

per month. Thereafter the volume of letters transmitted by Respondents periodically increased, and, at present, Respondents transmit in excess of 10,000 letters per month.

17. Although precise figures are unavailable, Respondents obtain at least one client for every 100 letters sent out. Respondents, in engaging in their "letter program," were to an extent motivated by a desire to generate income producing clients for their firm.

18. In and prior to August 1980, Sitelines, Inc. was a California corporation, wholly owned by Guardian Industries Corporation, a Delaware corporation.

19. Sitelines, Inc. and Guardian Industries Corporation were represented by Raymond A. Greenberg, Esq. in the case of *Mannarra v. Sitelines, Inc. et al*, case No. SOC 37028, filed in the Los Angeles Superior Court. Said representation by Greenberg appeared of record in the court file in case No. SOC 37028. After trial in said case, Guardian Industries Corporation was exonerated of any liability. Judgment was entered against Sitelines, Inc. on October 30, 1979.

20. Sitelines, Inc. was a service corporation owning no assets available to California creditors, and having no liabilities other than operating expenses and the judgment entered in *Mannarra v. Sitelines, Inc et al.* Mr. Greenberg concluded that Sitelines, Inc. was judgment-proof, and he so advised his clients. Thereafter, Mr. Greenberg's clients relied on his advice not to pay the outstanding judgment.

21. In August of 1980, Respondents caused a letter with attachments to be sent to Sitelines, Inc.

The letter and attachments refer to Chapter 13 bankruptcy procedures, which is not a remedy available to corporations.

22. Pursuant to its normal office procedure, the manager of Sitelines, Inc. forwarded the letter and attachments to the home offices of Guardian Industries in Detroit, Michigan. The officers of Guardian Industries interpreted Respondents' letter to mean that their assets could be attached, and as a result, Guardian Industries decided, contrary to Mr. Greenberg's advice and the long-standing decision not to satisfy the judgment, to pay the plaintiff in said action.

23. Respondents' letter and attachments to Sitelines contain matter which was false or deceptive, or which tended to confuse, deceive or mislead, in that it referred to Chapter 13 bankruptcy procedures which were not available to Sitelines, and in that the assets of Sitelines or Guardian Industries could not be attached in said civil action; said letter and attachments violated Rule 2-101 (A) (2).

24. In or about April 1980, Lawrence L. Roman was provided with a copy of a letter Respondents caused to be sent to his client, Anna Russo.

25. Mr. Roman believed the letter implied that: (1) service would be provided by the Respondents for the total amount of $60.00; and (2) the proposed "plan" referred to something other than bankruptcy proceedings.

26. After Mr. Roman read said letter, he telephoned Respondents' office, purporting to be a debtor. Mr. Roman spoke with a man identifying himself as attorney Sidney A. Schulein. When he inquired as to whether the proposed "plans" were

akin to bankruptcy, Mr. Schulein responded that "They could be, depending on whether you filed under Chapter 11 or Chapter 13." When he inquired as to the cost of the "plans," Mr. Schulein indicated that in addition to the $60.00 filing fee, 10 additional monthly payments in the sum of $60.00 each would be charged as attorney's fees. When he mentioned that the letter implied that the total cost of the "plan" would be $60.00, Mr. Schulein replied: "Have you ever seen the paperwork involved?"

27. Respondents' letter and attachments to Russo contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in that service would not be provided for the total amount of $60.00 as Respondents' letter implied; and in that the proposed "plan" referred to bankruptcy proceedings, although this fact was not disclosed by Respondents' letter.

28. In 1979, William A. Wagstaff, Jr. was the defendant in a Los Angeles Municipal Court action entitled *F. Sitzer v. William A. Wagstaff*, case no. 250 891. His attorney of record was James V. Jordan, Esq.

29. In or about October 1979, Plaintiff in said action filed a motion for summary judgment. Mr. Jordan filed in opposition to said motion on behalf of Mr. Wagstaff. Prior to the hearing on said motion, scheduled for November 5, 1979, Respondents sent a letter with enclosures to Mr. and Mrs. Wagstaff.

30. Plaintiff's motion for summary judgment was denied.

31. Respondents' letter and attachments to Wagstaff contained matter which was false or deceptive,

or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2), in that, contrary to the true facts, the letter falsely suggests that the natural result of the civil action would be a judgment adverse to Mr. Wagstaff and execution upon his assets.

32. On or about April 6, 1978, Fidela G. Parayno was served with Summons and Complaint for Specific Performance in the action entitled *Izuel v. Parayno et. al.*, case no. C 236 126 filed in the Los Angeles Superior Court.

33. Ms. Parayno thereafter retained Charles J. Tarr, Esq. to represent her in said action. On May 5, 1978, Mr. Tarr filed an Answer to Complaint on Ms. Paryno's behalf.

34. On or about February 21, 1979, Respondents caused a letter to be sent to Ms. Parayno.

35. On February 21, 1979, documents in the court file reflected that said action was then at issue.

36. Ms. Parayno was extremely upset and concerned as a result of receiving Respondents' letter. Her receipt of Respondents' letter caused her to question whether Mr. Tarr was adequately representing her interests. She felt that she was in imminent danger of losing her personal property.

37. After she received Respondents' letter, Ms. Parayno contacted Mr. Tarr. Mr. Tarr had to convince his client that he was protecting her interest in the civil action, because she became upset with him after receiving Respondents' letter.

38. Respondents' letter to Parayno contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in that the natural

course of said civil action did not conform to Respondents' implications to the effect that judgment would not be rendered against Parayno, and her assets would be executed upon.

39. Prior to 1979, Jerral W. Main was involved in a commercial transaction whereby goods and merchandise were purchased for business purposes. In or about 1979, judgment in the approximate sum of $59,000.00 was entered against Mr. Main in the action entitled *Creditors Adjustment Bureau v. Jerral W. Main*, filed in the Los Angeles Superior Court, case no. C 253 570.

40. Between the date of entry of judgment and July 1980, Mr. Main voluntarily paid the sum of $42,000.00 to Creditors Adjustment Bureau pursuant to a stipulated payment schedule.

41. In or about July 1980, Mr. Main received a letter, with attachments, from Respondents.

42. Upon his receipt of said letter with attachments, Mr. Main became extremely upset due to the statements contained therein, and he telephoned the plaintiff, Creditors Adjustment Bureau, in order to determine whether they had in fact obtained a writ of execution. Mr. Main was informed by Creditors Adjustment Bureau that they had not executed on his property pursuant to a writ of execution, nor did they intend to.

43. Mr. Main then telephoned Respondents' office and spoke to a female employee. The employee told Mr. Main that she did not know the specifics of his case, but that the statements contained in Respondents' letter with attachments were accurate. She also informed Mr. Main that he could schedule an appointment to speak with someone if he wanted more information. Mr.

Main had no interest in going to Respondents' office.

44. In fact, Creditors Adjustment Bureau did not attempt to execute pursuant to a writ of execution, nor was any of Mr. Main's property attached. Mr. Main ultimately completed satisfaction of the outstanding judgment voluntarily.

45. Respondents' letter with attachment to Main contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2). Further, Respondents' letter with attachments to Main was transmitted in a manner which involved intrusion or threats, in violation of Rule 2-101(A)(6).

46. In late 1978, Valerie Keen Sims was employed by Norman Levine. At Mr. Levine's request, Ms. Sims rented an automobile for him. Subsequently, Mr. Levine refused to pay for the rental charges.

47. Ms. Sims was sued by the rental company in the matter entitled *Walker Motor Co., Inc. v. Valerie J. Keen* filed in the Los Angeles Municipal Court, Case no. 304 043. She decided to allow judgment to be taken against her and to seek subrogation from Mr. Levine. Judgment was entered against Ms. Sims in the amount of $420.00 on February 13, 1979.

48. On or about February 10, 1979, Ms. Sims sued Norman Levine in the Los Angeles Municipal Court case no. 308 132 entitled *Valerie J. Keen v. Levine.* Before trial in said action, Ms. Sims accepted settlement in the amount of $1,000.00.

49. On or about March 15, 1979, Ms. Sims received a letter, with attachments, from Respondents. Said letter was mailed to Ms. Sims at her place of employment, Weight Reduction Medical Clinic.

Consistent with office procedures, Ms. Sims' employer opened and read the original of this letter. Ms. Sims' employer was very upset about the possibility that her wages might be garnished, was concerned that Ms. Sims had financial problems which could affect her trustworthiness, and instructed Ms. Sims to take care of the matter.

50. Upon receiving Respondents' letter, Ms. Sims immediately telephoned Respondents' office. She spoke with a woman who identified herself as a secretary in Respondents' office. Ms. Sims informed the secretary that the statements contained in Respondents' letter were inaccurate, that Respondents should not contact her in the future, and that she considered Respondents' letter to be an invasion of her privacy.

51. A few weeks later, Respondents sent a second letter to Ms. Sims at her residence. Ms. Sims cannot locate the second letter. Ms. Sims' husband, Robert, saw the letter and became extremely angry. Robert Sims interpreted the letter to mean that the action against his wife had not been settled, that some problem had developed in the action which Respondents were bringing to Ms. Sims' attention and that his wife was lying to him. Mr. Sims left the family residence for three days.

52. Respondents' letters to Sims contained matter which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2). Further, Respondents' letters to Sims were transmitted in a manner which involved intrusion, coercion, duress, compulsion, intimidation, threats or vexacious or harassing conduct, in violation of Rule 2-101(A)(6).

53. On or about March 30, 1978, Daisy of California, a California corporation, was sued by Melinda Mathes in Los Angeles Municipal Court action 218 530. An Answer to the Complaint was filed on or about May 24, 1978, by the defendant, Daisy of California's (hereafter "Daisy") attorney of record.

54. Trial was scheduled in said matter for November 17, 1978. The matter was taken off calendar by stipulation of the parties on November 17, 1978, and rescheduling for trial on January 19, 1979.

55. On or about November 28, 1978, the parties entered in the court file a stipulation taking the Plaintiff's Motion to Strike and Motion for Default off calendar. The Plaintiff had agreed not to seek a default judgment against Daisy and the parties had entered into serious settlement negotiations by November 28, 1978.

56. Thereafter, Respondents' letter dated November 29, 1978 was received at the offices of Daisy.

57. The president of Daisy, Joe DiPaulo, read Respondents' letter when it was received at Daisy's offices. Mr. DiPaulo interpreted Respondents' letter to mean that the Plaintiff was obtaining a default judgment against Daisy and that something of which he was not aware had occurred in the action. In fact, the true status of said action was not as represented in Respondents' letter.

58. Respondents' letter to Daisy contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2).

59. The letters and enclosures omitted any statement that the relief proposed by Respondents required

a filing pursuant to the Bankruptcy Act. Such omission was willful and misleading in violation of Rule 2-101(A)(3).

60. The letters and enclosures omitted stating that the relief proposed by Respondents would require payment of attorneys' fees to Respondents for their employment. Such omission was willful and misleading and constituted a violation of Rule 2-101(A)(3).

61. The letters and enclosures failed to state clearly, and expressly or by context, that they constituted a communication concerning the availability for professional employment of Respondents' firm. Such omission was willful and constituted a violation of Rule 2-101(A)(4).

62. Respondents did not violate Rule 2-101(B) in that Respondents' communications by mail to the potential clients were not for the purpose of seeking professional employment in the particular action or proceeding referenced in the communication, but rather with respect to possible debtor protection proceedings under the Federal Bankruptcy Act. This was the area of the law in which Respondents practiced.

63. Respondents' system of solicitation which involved up to 10,000 letters per month purporting to give pertinent information about the status of each addressee's case involved a high probability for error. The statements regarding the status of the case were added to inject an element of urgency which would induce the recipient to the desired action. Illustrative of almost inevitable inaccuracies are set forth in the findings relative to the *Wagstaff*, *Main* and *Daisy* matters. The system Respondents adopted constituted a reckless disregard of Respondents' obligations under

Rule 2-101(A)(1), (2) and (3). Such reckless disregard can and does add the element of scienter and thus willfulness.

Voting Yes: Anagnos, Anthony, Bridgett, Ching, Coil, Cooper, Eanni, Long, Mackey, Lathrop (Referees Anthony and Eanni also voting to adopt as findings of fact, findings 33, 43 and 51 contained in the Hearing Panel's Decision that Respondents violated Rule 7-103, Rules of Professional Conduct).

Voting No: Anderson, Craig and Dreyfus (Referees Anderson and Dreyfus each so voting on the ground that the findings of fact are not supported by the evidence).

Not Voting: O'Neill, Tornay.

Upon motion made, seconded and adopted, it was

RESOLVED that the Review Department recommends to the Supreme Court that the respondents, Andrew Leoni and Houston Slate, be suspended from the practice of law in the State of California for a period of thirty (30) days; that execution of the order for such suspension be stayed; and, that Respondent be placed upon probation for said period of thirty (30) days upon the following conditions:

1. That during the period of probation, they shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

2. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, they shall answer fully, promptly and truthfully to the Presiding Referee of the State Bar Court or his designee at the respondent's office or an office of the State Bar

(provided, however, that nothing herein shall prohibit the respondent and the Presiding Referee from fixing another place by agreement), any inquiry or inquiries directed to them personally or in writing by said Presiding Referee or his designee relating to whether respondent is complying or has complied with these terms of probation;

3. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

4. That at the expiration of said probation period, if they have complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of thirty (30) days shall be satisfied and the suspension shall be terminated; and it is

FURTHER RESOLVED that the Respondents not be ordered to take and pass the Professional Responsibility Examination; and it is

FURTHER RESOLVED that the Review Department advises the Supreme Court that its reason for modifying the recommendation of the Hearing Panel and for making a different recommendation is that the degree of discipline recommended by the majority of the hearing panel is insufficient when considering the conscious and reckless disregard by Respondents of their obligations under Rule 2-101(A), Rules of Professional Conduct, coupled with the injury done to certain members of the public as a result.

Voting Yes: Anthony, Bridgett, Ching, Coil, Cooper, Eanni, Mackey, Lathrop.

Voting No: Anagnos, Anderson, Craig, Dreyfus, Long (Referees Craig and Dreyfus each so voting on the ground that Respondents' conduct was constitutionally protected; Referees Anagnos and Long each so vot-

ing on the ground that a public reproval is sufficient discipline in this matter).

Dated: August 4, 1983

/s/ Judy Duffield
JUDY DUFFIELD, Manager
Court Clerk's Office
of the State Bar Court

DECLARATION OF SERVICE

I, the undersigned, over the age of 18 years, whose business address and place of employment is 1230 West Third Street, Los Angeles, California, declare that I am not a party to the within action; that in the City and County of Los Angeles, on the date shown below, I deposited a true copy of the within

MINUTES OF REVIEW DEPARTMENT MEETING HELD ON JUNE 16, 1983

in a sealed envelope as follows:

In a facility regularly maintained by the United States Postal Service with postage thereon fully prepaid addressed to:

Andrew F. Leoni, Esq.
650 South Spring Street
Suite 650
Los Angeles, CA 90014

Houston H. Slate, Esq.
650 South Spring Street
Suite 650
Los Angeles, CA 90014

In an inter-office mail facility regularly maintained by the State Bar of California addressed to:

Gerald Markle, Esq.
Ellen Pansky, Attorney at Law

Dated: November 7, 1983

I declare under penalty of perjury at Los Angeles, California, on the date shown above, that the foregoing is true and correct.

/s/ Paul Bailer
PAUL BAILER
Administrative Assistant
Office of the State Bar Court

APPENDIX C

THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT
DISTRICT 7

81-0-102 LA
Los Angeles No. 3384

IN THE MATTER OF
ANDREW LEONI, and
HOUSTON SLATE,
Members of the State Bar

[Filed Sept. 23, 1982]

DECISION

The above-entitled matter came on regularly for hearing before this Hearing Panel on May 6, 1982, June 23, 1982, July 12, 1982, and August 12, 1982. Present at said hearing were Jerome Rosenfield, Esq., Principal Referee, Daniel Rothman, Esq., Referee, Sol Pavlosky, Referee, R. Gerald Markle, Esq., and Ellen Pansky, Esq., co-Examiners for the State Bar, Houston Slate, Esq., Respondent, and Howard Weitzman, Esq., Counsel for Respondents. The hearings of May 6 and July 12 were reported by Marion Miller, C.S.R. The hearings of June 23 and August 12 were reported by Mavis Theodorou, C.S.R.

The Hearing Panel makes the following findings of fact:

FINDINGS OF FACT

1. Respondent Houston Slate was admitted to the practice of law in the State of California on January 8, 1947.

2. Respondent Andrew Leoni was admitted to the practice of law in the State of California on June 19, 1946.

3. Respondents Slate and Leoni were at all relevant times engaged in the practice of law under the name of "Slate and Leoni," which firm is a professional corporation organized under the California laws relating to professional corporations.

4. Commencing in or about November of 1978, Respondents instituted a "letter program" consisting of the transmittal of direct mailings to particular individuals, regarding specific cases or matters in which those individuals were then involved. Respondents have continued their "letter program" at all times subsequent to November of 1978, and until the present.

5. Each of the individuals to whom Respondents' letters were sent were either named defendants in Small Claims or Municipal Court civil actions, or were owners of real property which was in foreclosure.

6. The names and addresses of certain of the individuals to whom Respondents' letters were sent were obtained by Respondents, their agents or employees, from records of public judicial proceedings on file in the Los Angeles County Municipal and Small Claims Courts.

7. The names and addresses of others of the individuals to whom Respondents' letters were sent were obtained by Respondents, their agents or employees, from public newspapers listing property owners against whose homes notices of default had been filed with the Los Angeles County Recorder.

8. Between in or about November of 1978, and in or about July of 1980, and continuing thereafter, Respondents caused their agents or employees to regularly monitor the status of civil collection actions, unlawful detainer actions and personal injury and property damage

actions filed in the Los Angeles County Municipal and Small Claims Courts. As a result of said monitoring process, Respondents' agents or employees would obtain the names and addresses of named defendants against whom:

a. Civil complaints for money had been filed;

b. Unlawful detainer actions had been filed;

c. Civil complaints for personal injury and property damage had been filed;

d. Requests to Enter Default had been filed in collection actions;

e. Writs of Execution had been issued; and,

f. Writs of Execution had been served.

9. In the case of all individuals against whom civil complaints for money had been filed, Respondents caused letters to be sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

10. In the case of all individuals against whom unlawful detainer actions had been filed, Respondents caused letters to be sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

11. In the case of all individuals against whom personal injury and property damage actions had been filed, Respondents caused letters to be sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

12. In the case of all individuals against whom Requests to Enter Default had been filed in collection ac-

tions, Respondents caused letters to be sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

13. In the case of all individuals against whom Writs of Execution had issued, Respondents caused letters to sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

14. In the case of all individuals against whom Writs of Execution had been served, Respondents caused letters to be sent to said individuals regarding the action in which they were named, and seeking professional employment for pecuniary gain, in violation of Rule 2-101 (B).

15. Each of the letters referred to in Paragraphs 9-14 herein failed to identify the particular judicial proceeding involving the particular recipient of the letter by reference to the particular branch or judicial district in which the judicial proceeding was pending, or by reference to the actual case or file number which the particular proceeding was assigned. Each of said letters did, however, contain a reference number which was a temporary identification number. Respondents caused said temporary identification number to be included for the purpose of maintaining their office record of the letters sent. As a result, each of said letters were presented or arranged in a manner or format which tended to confuse, deceive, or mislead, in violation of Rule 2-101(A)(2).

16. Some of the individuals to whom Respondents' letters were sent were, at the time, represented by other counsel in the particular judicial proceedings which constituted the subject of Respondents' letters. In some of those cases, the fact of said representation would have been apparent upon a review of the court file pertaining

to the particular proceedings involved. Respondents made no effort to determine if any of the recipients of their letters were represented by other counsel at the time the letters were sent.

17. Between in or about November of 1978 and in or about July of 1980, and continuing thereafter, Respondents caused their agents or employees to regularly monitor public newspapers containing lists of owners of real property against whom notices of default had been filed with the Los Angeles County Recorder. As a result of said monitoring process, Respondents' agents or employees would obtain the names and addresses of real property owners whose homes were in foreclosure.

18. Respondents caused letters to be sent to said property owners regarding the subject of the foreclosure, and seeking professional employment for pecuniary gain, in violation of Rule 2-101(B).

19. In addition to the content of the various letters described herein, Respondents also caused an enclosure or enclosures to be included with each letter sent. The inclusion of a particular enclosure or number of enclosures was dependent upon the type of action or matter involved and/or upon the stage of the particular proceeding at the time the letter was sent.

20. One such enclosure is entitled "Money Problems?" Said enclosure was included with virtually all letters sent by Respondents.

21. A second such enclosure is entitled "How To Pay Debts Under Court Protection." Said enclosure was included with letters sent to individuals against whom civil complaints for money had been filed, to individuals against whom Requests to Enter Default had been filed, and to individuals against whom Writs of Execution had been issued or served.

22. A third such enclosure is entitled "What is a Writ of Execution?" Said enclosure was included with

the letters sent following the court's issuance of a Writ of Execution.

23. A fourth such enclosure is entitled "If You Are In Business—And You Are Facing a Writ of Execution?" Said enclosure was included with letters sent following the court's issuance of a Writ of Execution, to recipients who were business defendants.

24. A fifth such enclosure is entitled "Is Your Business Having Money Flow Problems?" Said enclosure was also included with letters sent following the court's issuance of a Writ of Execution to recipients who were business defendants.

25. During the period of time immediately following the inception of Respondents' letter program, in or about November of 1978, the volume of letters transmitted by Respondents was roughly 2,000 per month. Thereafter the volume of letters transmitted by Respondents periodically increased, and, at present, Respondents transmit in excess of 10,000 letters per month.

26. Although precise figures are unavailable, Respondents obtain at least one client for every 100 letters sent out. Respondents, in engaging in their "letter program," were to an extent motivated by a desire to generate income producing clients for their firm.

27. In and prior to August, 1980, Sitelines, Inc. was a California corporation, wholly owned by Guardian Industries Corporation, a Delaware corporation.

28. Sitelines, Inc. and Guardian Industries Corporation were represented by Raymond A. Greenberg, Esq. in the case of *Mannarra v. Sitelines, Inc. et al*, case No. SOC 37028, filed in the Los Angeles Superior Court. Said representation by Greenberg appeared of record in the court file in case No. SOC 37028. After trial in said case, Guardian Industries Corporation was exonerated of any liability. Judgment was entered against Sitelines Inc. on October 30, 1979.

29. Sitelines, Inc. was a service corporation owing no assets available to California creditors, and having no liabilities other than operating expenses and the judgment entered in *Mannarra v. Sitelines, Inc. et al.* Mr. Greenberg concluded that Sitelines, Inc. was judgment-proof, and he so advised his clients. Thereafter, Mr. Greenberg's clients relied on his advice not to pay the outstanding judgment.

30. In August of 1980, Respondents caused a letter with attachments, copies of which are attached hereto as Exhibit 1 and incorporated herein by reference, to be sent to Sitelines, Inc. The letter and attachments refer to Chapter 13 bankruptcy procedures, which is not a remedy available to corporations.

31. Pursuant to its normal office procedure, the manager of Sitelines, Inc. forwarded the letter and attachments to the home offices of Guardian Industries in Detroit, Michigan. The officers of Guardian Industries interpreted Respondents' letter to mean that their assets could be attached, and, as a result, Guardian Industries decided, contrary to Mr. Greenberg's advice and the long-standing decision not to satisfy the judgment, to pay the plaintiff in said action.

32. Respondents' letter and attachments to Sitelines contain matter which was false or deceptive, or which tended to confuse, deceive or mislead, in that it referred to Chapter 13 bankruptcy procedures which were not available to Sitelines, and in that the assets of Sitelines or Guardian Industries could not be attached in said civil action; said letter and attachments violated Rule 2-101(A)(2).

33. Respondents' transmittal of their letter and attachments to Sitelines was a direct communication with a party whom Respondents knew, or constructively knew, were represented by counsel upon a subject of contro-

versy, without the express consent of such counsel, in violation of Rule 7-103.

34. In or about April, 1980, Lawrence L. Roman was provided with a copy of a letter Respondents caused to be sent to his client, Anna Russo. A copy of said letter, with attachments, is attached hereto as Exhibit 2, and incorporated herein by reference.

35. Mr. Roman believed the letter implied that: (1) service would be provided by the Respondents for the total amount of $60.00; and (2) the proposed "plan" referred to something other than bankruptcy proceedings.

36. After Mr. Roman read Exhibit 2, he telephoned Respondents' office, purporting to be a debtor. Mr. Roman spoke with a man identifying himself as attorney Sidney A. Schulein. When he inquired as to whether the proposed "plans" were akin to bankruptcy, Mr. Schulein responded that "They could be, depending on whether you filed under Chapter 11 or Chapter 13." When he inquired as to the cost of the "plans", Mr. Schulein indicated that in addition to the $60.00 filing fee, 10 additional monthly payments in the sum of $60.00 each would be charged as attorney's fees. When he mentioned that the letter implied that the total cost of the "plan" would be $60.00, Mr. Schulein replied: "Have you ever seen the paperwork involved?"

37. Respondents' letter and attachments to Russo contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in that service would not be provided for the total amount of $60.00 as Respondents' letter implied; and in that the proposed "plan" referred to bankruptcy proceedings, although this fact was not disclosed by Respondents' letter.

38. In 1979, William A. Wagstaff, Jr. was the defendant in a Los Angeles Municipal Court action entitled *F. Sitzer v. William A. Wagstaff*, case no. 250 891. His attorney of record was James V. Jordan, Esq.

39. In or about October, 1979, Plaintiff in said action filed a motion for summary judgment. Mr. Jordan filed an opposition to said motion on behalf of Mr. Wagstaff. Prior to the hearing on said motion, scheduled for November 5, 1979, Respondents sent a letter with enclosures to Mr. and Mrs. Wagstaff, a copy of which, with attachments, is attached as Exhibit 3 hereto and incorporated herein by reference.

40. If called as a witness herein, Mr. Wagstaff would testify that Respondents' letter upset and shocked him, causing him to believe that his rights were not being protected in the lawsuit. Mr. Wagstaff would further testify that he interpreted Respondents' letter to mean that he was candidate for bankruptcy, which also upset him.

41. Plaintiff's motion for summary judgment was denied.

42. Respondents' letter and attachments to Wagstaff contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2), in that, contrary to the true facts, the letter falsely suggests that the natural result of the civil action would be a judgment adverse to Mr. Wagstaff and execution upon his assets.

43. Respondents' transmittal of their letter and attachments to Wagstaff was a direct communication with a party whom Respondents knew, or constructively knew, were represented by counsel upon a subject of controversy, without the express consent of such counsel, in violation of Rule 7-103.

44. On or about April 6, 1978, Fidela G. Parayno was served with Summons and Complaint for Specific Performance in the action entitled *Izuel v. Parayno et. al.*, case no. C 236 126 filed in the Los Angeles Superior Court.

45. Ms. Parayno thereafter retained Charles J. Tarr, Esq. to represent her in said action. On May 5, 1978, Mr. Tarr filed an Answer to Complaint on Ms. Parayno's behalf.

46. On or about February 21, 1979, Respondents caused a letter to be sent to Ms. Parayno, a copy of which is attached hereto as Exhibit 4 and is incorporated herein by reference.

47. On February 21, 1979, documents in the court file reflected that said action was then at issue.

48. Ms. Parayno was extremely upset and concerned as a result of receiving Respondents' letter. Her receipt of Respondents' letter caused her to question whether Mr. Tarr was adequately representing her interests. She felt that she was in imminent danger of losing her personal property.

49. After she received Respondents' letter, Ms. Parayno contacted Mr. Tarr. Mr. Tarr had to convince his client that he was protecting her interest in the civil action, because she became upset with him after receiving Respondents' letter.

50. Respondent's letter to Parayno contained matter which was false or deceptive, or which tended to confuse, deceive, or mislead, in that the natural course of said civil action did not conform to Respondents' implications to the effect that judgment would be rendered against Parayno, and her assets would be executed upon.

51. Respondents' transmittal of their letter and attachments to Parayno was a direct communication with a party whom Respondents knew, or constructively knew, were represented by counsel upon a subject of controversy, without the express consent of such counsel, in violation of Rule 7-103.

52. Prior to 1979, Jerral W. Main was involved in a commercial transaction whereby goods and merchandise were purchased for business purposes. In or about 1979, judgment in the approximate sum of $59,000.00 was entered against Mr. Main in the action entitled *Creditors Adjustment Bureau v. Jerral W. Main*, filed in the Los Angeles Superior Court, case no. C 253 570.

53. Between the date of entry of judgment and July, 1980, Mr. Main voluntarily paid the sum of $42,000.00 to Creditors Adjustment Bureau pursuant to a stipulated payment schedule.

54. In or about July, 1980, Mr. Main received a letter, with attachments, from Respondents, a copy of which is attached hereto as Exhibit 5, and incorporated herein by reference.

55. Upon his receipt of said letter with attachments, Mr. Main became extremely upset due to the statements contained therein, and he telephoned the plaintiff, Creditors Adjustment Bureau, in order to determine whether they had in fact obtained a writ of execution. Mr. Main was informed by Creditors Adjustment Bureau that they had not executed on his property pursuant to a writ of execution, nor did they intend to.

56. Mr. Main then telephoned Respondents' office and spoke to a female employee. The employee told Mr. Main that she did not know the specifics of his case, but that the statements contained in Respondents' letter with attachments were accurate. She also informed Mr. Main that he could schedule an appointment to speak with someone if he wanted more information. Mr. Main had no interest in going to Respondents' office.

57. In fact, Creditors Adjustment Bureau did not attempt to execute pursuant to a writ of execution, nor was any of Mr. Main's property attached. Mr. Main ultimately completed satisfaction of the outstanding judgment voluntarily.

58. Respondents' letter with attachment to Main contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2). Further, Respondents' letter with attachments to Main was transmitted in a manner which involved intrusion or threats, in violation of Rule 2-101 (A)(6).

59. In late 1978, Valerie Keen Sims was employed by Norman Levine. At Mr. Levine's request, Ms. Sims rented an automobile for him. Subsequently, Mr. Levine refused to pay for the rental charges.

60. Ms. Sims was sued by the rental car company in the matter entitled *Walker Motor Co. Inc. v. Valerie J. Keen* filed in the Los Angeles Municipal Court, Case no. 304 043. She decided to allow judgment to be taken against her and to seek subrogation from Mr. Levine. Judgment was entered against Ms. Sims in the amount of $420.00 on February 13, 1979.

61. On or about February 10, 1979, Ms. Sims sued Norman Levine in the Los Angeles Municipal Court case no. 308 132 entitled *Valerie J. Keen v. Levine.* Before trial in said action, Ms. Sims accepted settlement in the amount of $1,000.00.

62. On or about March 15, 1979, Ms. Sims received a letter; with attachments, from Respondents. A copy of said letter is attached hereto as Exhibit 6. Said letter was mailed to Ms. Sims at her place of employment, Weight Reduction Medical Clinic. Consistent with office procedures, Ms. Sims' employer opened and read the original of Exhibit 4. Ms. Sims' employer was very upset about the possibility that her wages might be garnished, was concerned that Ms. Sims had financial problems which could affect her truthworthiness, and instructed Ms. Sims to take care of the matter.

63. Upon receiving Respondents' letter, Ms. Sims immediately telephoned Respondents' office. She spoke with

a woman who identified herself as a secretary in Respondents' office. Ms. Sims informed the secretary that the statements contained in Respondents' letter were inaccurate, that Respondents should not contact her in the future, and that she considered Respondents' letter to be an invasion of her privacy.

64. A few weeks later, Respondents sent a second letter to Ms. Sims at her residence. Ms. Sims cannot locate the second letter. Ms. Sims' husband, Robert, saw the letter and became extremely angry. Robert Sims interpreted the letter to mean that the action against his wife had not been settled, that some problem had developed in the action which Respondents were bringing to Ms. Sims attention and that his wife was lying to him. Mr. Sims left the family residence for three days.

65. Respondents' letters to Sims contained matter which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2). Further, Respondents' letters to Sims were transmitted in a manner which involved intrusion, coercion, duress, compulsion, intimidation, threats or vexacious or harassing conduct, in violation of Rule 2-101(A)(6).

66. On or about March 30, 1978, Daisy of California, a California corporation, was sued by Melinda Mathes in Los Angeles Municipal Court action 218 530. An Answer to the Complaint was filed on or about May 24, 1978, by the defendant Daisy of California's (hereafter "Daisy") attorney of record.

67. Trial was scheduled in said matter for November 17, 1978. The matter was taken off calendar by stipulation of the parties on November 17, 1978, and rescheduled for trial on January 19, 1979.

68. On or about November 28, 1978, the parties entered in the court file a stipulation taking the Plaintiff's Motion to Strike and Motion for Default off calendar.

The Plaintiff had agreed not to seek a default judgment against Daisy and the parties had entered into serious settlement negotiations by November 28, 1978.

69. Thereafter, Respondents' letter dated November 29, 1978, a copy of which, with attachments, is attached hereto as Exhibit 7 was received at the offices of Daisy.

70. The president of Daisy, Joe DiPaulo, read Respondents' letter when it was received at Daisy's offices. Mr. DiPaulo interpreted Respondents' letter to mean that the Plaintiff was obtaining a default judgment against Daisy and that something of which he was not aware had occurred in the action. In fact, the true status of said action was not as represented in Respondents' letter.

71. Respondents' letter to Daisy contained matter which was false or deceptive, or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2).

RECOMMENDED DISCIPLINE

It is recommended that Respondents, Andrew Leoni and Houston Slate, be suspended from the practice of law for a period of thirty (30) days. Execution of such suspension shall be stayed, subject to the condition that within thirty (30) days from the date upon which the order of the Supreme Court herein becomes effective, Respondents shall file written verification with the Los Angeles office of State Bar Court certifying by affidavit or under penalty of perjury that Respondents have ceased their "letter program" which is the subject of the within proceeding, and that Respondents have terminated any and all activities whereby communications are specifically directed to a particular potential client regarding that person's particular case or matter and seeking professional employment for pecuniary gain.

Dated: Sept. 1, 1982

/s/ Jerome D. Rosenfield
JEROME ROSENFIELD
Principal Referee

Dated: ———————

DANIEL ROTHMAN
Referee

Dated: 9/24/82

/s/ Sol Pavlosky
SOL PAVLOSKY
Referee

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

L.A. No. 31851

LEONI & SLATE

v.

STATE BAR OF CALIFORNIA

[Filed Sept. 25, 1985]

ORDER DENYING REHEARING

Petitioner's petition for rehearing DENIED.

Bird, C.J. and Grodin, J., are of the opinion the petition should be granted.

/s/ Bird
Chief Justice

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

L. A. 31851

ANDREW LEONI and HOUSTON SLATE,
Petitioners,

v.

STATE BAR OF CALIFORNIA,
Respondent.

[Filed December 20, 1985]

NOTICE OF APPEAL

Petitioners Andrew Leoni and Houston Slate hereby give notice of their appeal to the United States Supreme Court of the decision of the Court in the above-captioned case, entered on August 22, 1985, petition for rehearing denied, September 25, 1985. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Paul M. Smith
JOSEPH N. ONEK
PAUL M. SMITH
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Date: December 19, 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing notice of appeal were served by first-class mail, postage prepaid on counsel for respondent and the Attorney General at the following addresses:

Herbert M. Rosenthal
Truitt A. Richey, Jr.
555 Franklin Street
San Francisco, CA 94102

The Honorable John Van de Kamp
Attorney General of California
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, CA 90010

/s/ Paul Smith
PAUL M. SMITH

December 19, 1985

APPENDIX F

[Slate & Leoni Letterhead]

INFORMAL LETTER

FROM: SLATE and LEONI

TO: JERRAL W. MAIN

The records of the Superior Court, County of Los Angeles, reflect an outstanding judgment against you.

First, let me tell you that our law firm does not represent your creditor. Slate and Leoni does NOT want any money from you. Slate and Leoni is NOT trying to collect this judgment. We have nothing to do with your creditor.

This creditor, who holds the judgment against you, has taken one more step, that maybe you do not know about. A writ of execution has been issued by the Court. This is a Court order, ordering the Sheriff to levy on your assets.

We are writing to tell you that new laws have recently been put into effect, to afford protection against judgments and writs of execution. You may have your own lawyer, and if so, we suggest you talk with him or her, and ask about Title 11, U.S.C., Section 1325.

If you don't have your own lawyer, you are welcome to talk with us, and we will recommend to you what to do. There is no charge for talking with us and getting advice as to what you can do.

Very truly yours,

SLATE AND LEONI

By /s/ Hugh Slate

[Slate & Leoni Letterhead]

INFORMAL LETTER

FROM: SLATE and LEONI

TO: DAISY OF CALIF., INC. November 29, 1978

Court records reflect that one of your creditors has sued you and is in the process of getting a judgment against you. We assume this has come about because of unexpected and unplanned expenses.

First, let me tell you that our law firm does NOT represent your creditor. Slate and Leoni does NOT want any money out of you. Slate and Leoni is NOT trying to collect money from you. We have nothing at all to do with your creditor. We are "on your side."

They have sued you, and according to the Court files, have served you with the legal papers. Now, they are taking other steps, and you may not know about these. They are asking the Court to declare you in default in the lawsuit and order a judgment against you. The next step is to have the court issue a writ of execution against you. This is a Court order, ordering the Marshal or Sheriff to levy on your assets. We enclose information about a writ of execution.

We suggest that the problem be worked out *before* the writ of execution goes into effect. The first thing we recommend is that the creditor be approached, and if possible, a payment program be worked out, at so much a month until the debt is paid. If the creditor will not agree on a payment program that you can handle, you can ask the Court to set the amounts to be paid by you. The enclosed material tells you how to ask the Court to protect you from writs of execution.

Again, Slate and Leoni does NOT represent the creditor that wants money out of you. We have nothing to do with

them. We are writing to tell you about the writ of execution, and to suggest you protect yourself.

You may have your own lawyer, and if so, we suggest you consult with him or her, and get advice as to what to do. If you don't have your own lawyer, feel free to telephone this office, and we will try to answer your questions. There is no charge for this.

Very truly yours,

SLATE and LEONI
A Professional Corporation

By /s/ Hugh Slate

MONEY PROBLEMS? LAWSUITS? HERE ARE SOME SUGGESTIONS.

Many people, through no fault of their own, are pressed by creditors, and lawsuits are filed against them. Creditors get writs of execution, and then the trouble starts. They telephone you at home and at work, telephone your employer, and run a writ of execution on your paychecks. Many people who owe money, and who are facing lawsuits, need a fresh start in life. They need relief from the debts and from the lawsuits.

There are several ways to handle debt problems, and it is not necessary to borrow more money. Below you will find some details of different plans of debt relief. One of them may be of particular interest to you. If you would like full details, we will mail them to you, and there is no charge. These plans are as follows:

1—HAVE YOU BEEN SUED, AND YOU WANT TO AVOID THAT LAWSUIT? It may be that someone has filed a lawsuit against you, and *you do not want to pay that creditor*, either because you feel you don't owe the money, or else you are not able to pay it. This can be done, and we can tell you how to do it.

2—"CONSOLIDATE" YOUR BILLS AND PAY THEM OVER A PERIOD OF TIME? *This is called a "Chapter 13."* We look at how much you bring home each month and how much you need to live on and feed the family. What is left is what you pay on the old bills. This stops lawsuits, stops salary attachments, and stops the creditors from telephoning you and your employer at work. You are not going to lose your car, your furniture, etc.

3—WOULD YOU LIKE TO GET RID OF THE DEBTS, AND MAKE A FRESH START? Many people, through no fault of their own, have a crushing burden of debts that is about to overwhelm them. These people need a fresh start in life. They would be better

off to walk away from the debts and not have to pay them. This can be done, and you don't lose your car, your furniture, etc. It stops lawsuits, and stops writs of execution and attachments on your paychecks. It also stops the creditors' telephoning you and telephoning your boss at work. This remedy is called an *ORDER FOR DEBT RELIEF.*

4—GET RID OF SOME OF THE DEBTS, BUT PAY THE ONES YOU WANT TO? This can be done, and you don't lose your car, your furniture, etc. Many people take this route just to get rid of one lawsuit that has been filed against them, and they keep right on paying their other debts. This is called a *LIMITED ORDER FOR DEBT RELIEF.*

If you would like a written explanation of the different types of debt relief, we will send this to you, and there is no charge. Telephone our office at (213) 623-8158, and tell the telephone receptionist what information you want. We will mail it to you. There is no charge.

SLATE AND LEONI
Attorneys at Law
Los Angeles, California

Telephone: (213) 623-8158

ORDER FOR DEBT RELIEF

Are collection agencies and bill collectors telephoning you at your home and your work? Are they threatening to sue you?

A new law has now gone into effect, called an "ORDER FOR DEBT RELIEF." It is to give relief to people who are being harassed and threatened by their creditors. Here's how it works:

As soon as you file an application for an ORDER FOR DEBT RELIEF, your creditors MUST stop all collection efforts. They cannot telephone you any more; they cannot telephone your employer; they cannot sue you; they cannot pick up your automobile. They can't even write to you.

FURNITURE, APPLIANCES, etc.: If you borrowed money from a finance company and you gave them a chattel mortgage on your household goods, furniture, etc., the ORDER FOR DEBT RELIEF stops the foreclosure immediately, and the ORDER FOR DEBT RELIEF provides that you keep your household goods, and you don't have to pay the finance company. And, they can't sue you to collect the balance.

ORDINARY DEBTS: You get out from under these, and you don't have to pay them. "Ordinary debts" include credit cards, charge accounts, doctor bills, hospital bills, lawsuits, judgments, loans from finance companies, automobile accidents, etc. You don't have to pay them. However, if you have some creditors you want to pay, you can do so. You can pick and choose, and pay the ones you want to pay.

GARNISHMENT: If you have already been sued by one of your creditors, and the Marshal has served a writ of execution on your employer, the ORDER FOR DEBT RELIEF stops the writ immediately. You file an application for an ORDER FOR DEBT RELIEF (this can be

done in one day), and as soon as it is filed, your employer cannot take out any more of your earnings. The Marshal will instruct your employer not to take out any more of your money.

FORECLOSURE ON YOUR HOME: The ORDER FOR DEBT RELIEF stops the foreclosure immediately, and you have a period of time within which to get on your feet, so you won't lose your equity in the real property.

FILING FEE: The cash money that you need to apply for an ORDER FOR DEBT RELIEF is sixty dollars. This one filing fee protects both husband and wife.

/s/ Hugh Slate
HUGH SLATE

WHAT IS A WRIT OF EXECUTION?

A writ of execution is an order of the Court directed to the Marshal or Sheriff. It orders the officer to seize and levy on property and assets belonging to the debtor, sell it at public auction, and give the money to the creditor, enough to pay the judgment, and all costs and expenses in full.

The law does not require that you be given notice of what the levying officer is about to do. No notice will be given to you. The Marshal or Sheriff can enforce a writ of execution in these ways:

(A) Serve your employer with legal papers, and your employer will be required to send in part of your earnings each payday from then on, until the judgment, plus interest, plus court costs, is paid in full. This is known as "garnisheeing the paycheck." Most employers have as intense dislike of this procedure and will tell the employee "go do someting about this."

(B) Clean out your bank account.

(C) Tow away your automobile and sell it at public auction. The officer will not listen when you tell him you need the car to go to and from work. He will take it anyway.

(D) Put a lien against any real property you are buying, including the house where you live.

There are some assets that under the law the levying officer cannot take away from you, such as your clothes, pension checks, disability income, insurance policies up to a limited amount, etc. Most other things of value can be taken away from you and sold at auction to satisfy the judgment.

If a writ of execution is outstanding against you, you should take immediate steps to protect yourself. There

are many things that can be legally done, even the day before the officer gets there, so you won't be vulnerable. For example, if you have any money on deposit in a *bank*, the officer can take it. However, if you have up to a specified amount in a *savings and loan association*, it cannot be seized by the officer. It is safe from the writ of execution.

We suggest you take proper steps now and don't delay. If you wait and permit the Marshal to levy under the writ of execution, many times considerable harm is done that could have been avoided.

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1091

In The

Supreme Court of the United States

October Term, 1985

ANDREW LEONI and HOUSTON SLATE,
Appellants,

vs.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court
of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether a State Rule that forbids false and misleading lawyer advertising and requires the inclusion in such advertising of statements that are intended to reduce or eliminate the likelihood that recipients of the advertising will be misled is constitutional.

2. Whether the application of such a Rule to lawyers who mass mail letters to a large numbers of specific persons purporting to give knowledgeable advice and counsel to such persons concerning their particular legal problems, when the lawyers do not have the specific information available to give such particular advice and when there are findings that some of the recipients were actually misled by the letters, violates such lawyers' constitutional rights.

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No. 85-1091

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ANDREW LEONI and HOUSTON SLATE,

Appellants,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, The State Bar of California (hereinafter "State Bar"), respectfully moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of California on the ground that the opinion of the Supreme Court of California is correctly decided and is in accord with other decisions of this Court

pertaining to the constitutional right of lawyers to advertise and for this reason no important issue of Federal law is presented. That opinion is reported as Andrew Leoni and Houston Slate, Petitioners, v. The State Bar of California, Respondent, 39 Cal.3d 609 (1985). A copy of the opinion is included as Appendix A to Appellant's Jurisdictional Statement (hereinafter referred to as AJS).

I

STATEMENT OF THE CASE

Appellants seek review of a decision of the Supreme Court of California that they be publicly reprimanded for a mass mailing letter program they instituted for the purpose of soliciting clients.

The Supreme Court of California concluded that Appellants' conduct violated rule 2-101 of the Rules of Professional Conduct. Rule 2-101 provides in relevant part:

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation,

threats or vexatious or harassing conduct.

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients.

The Rules of Professional Conduct are adopted by the State Bar of California and when approved by the Supreme Court are

binding upon all members of the State Bar. Upon wilful violation of the Rules of Professional Conduct, a member is subject to professional discipline. See California Business and Professions Code sections 6076 and 6077.*

The opinion of the Supreme Court of California held that Rule 2-101's content based regulation of misleading advertising was constitutional and further, that Petitioner's solicitation letters were misleading and that Rule 2-101 was constitutional as applied. The Court also held that because this is an evolving area of law no suspension should be imposed, but rather a public reprimand, for which the opinion would serve. Further the Court concluded that rather than prohibit the letter program the least restrictive

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* Unless otherwise stated, all statutory references are to the California Business and Professions Code. All references to Rules are to the Rules of Professional Conduct.

constitutional remedy would be to require Appellants to insert disclaimers or add clarifying language to the letters (AJS, page 2a).

Commencing in or about November 1978, Appellants instituted a "letter program" whereby direct mailings were transmitted to particular individuals, involving specific cases or matters in which those individuals were then involved. In engaging in their "letter program", petitioners were motivated, in part, by a desire to obtain fee-paying clients

Appellants directed their letters to either named defendants in small claims or municipal court civil actions, or to owners of real property which was in foreclosure. Appellants, their agents or employees obtained the names and addresses of certain of the recipients of their letters from records of public judicial proceedings on file in the Los Angeles municipal and small claims courts and they

obtained the names and addresses of other recipients from public newspapers which list property owners against whose homes notices of default had been filed with the Los Angeles County Recorder.

Beginning about November 1978 and continuing thereafter, Appellants caused their agents and employees to monitor the status of civil collection actions, unlawful detainer actions, personal injury actions and property damage actions filed in Los Angeles small claims and municipal court actions. As a result, Appellants would obtain the names and addresses of and send letters to named defendants against whom: (a) civil complaints for money had been filed; (b) unlawful detainer actions had been filed; (c) civil compliants for personal injury and property damage had been filed; (d) in collection actions in which requests to enter default had been filed, writs of execution had been issued, or writs of execution had

been served. In each of said letters, petitioners caused to be included an enclosure entitled "Money Problems."

A second enclosure, entitled "How to Pay Debts Under Court Protection," was included with letters sent to individuals against whom had been filed civil complaints for money, requests to enter default, and against whom writs of execution had been issued or served. A third such enclosure, entitled "What is a Writ of Execution?" was included with those letters directed towards individuals against whom a writ of execution had been issued. A fourth such enclosure, entitled "If You are in Business--And You Are Facing a Writ of Execution," was included with those letters sent to business defendants against whom a writ of execution had been issued. A fifth such enclosure, entitled "Is Your Business Having Money Flow Problems?" was also sent to business defendants against whom a writ

of execution had been issued.

Each of said letters failed to identify the particular judicial proceeding involving the particular recipient of petitioner's letter either by reference to the actual case or file number or by reference to the specific judicial branch or district in which the matter was pending. Rather, Appellants' letters contain a temporary identification number used for the purpose of maintaining petitioners' office records of the letters sent.*

Some of the individuals to whom Appellants' letters were sent were, at the

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* The effect of the omission of any identification of the particular judicial proceeding in which the recipient was a party and the inclusion of Appellants' own identification number was that the recipient could not discern the case to which appellants' letter related. The recipient could even have concluded that an additional lawsuit had been filed against him or her. Additionally, a recipient had no way of knowing that the number contained in petitioners' letter was an internal identification number relevant only to petitioners' offices.

time, represented by counsel in the particular judicial proceedings which were the subject of petitioners' letters. Appellants acknowledged that (although a review of the court file pertaining to the particular proceeding would have, in some cases, made the fact of representation apparent) they made no effort to determine if any of the recipients were represented by other counsel at the time the letters were sent.

The Appellants and the State Bar stipulated to seven separate specific instances in connection with which the constitutionality of Appellants' letter program could be tested. They also agreed that there may be other instances involving similar facts, but that additional evidence regarding those facts would be cumulative.

A. The "Sitelines" Matter

In and prior to August 1980, a California service corporation called

Sitelines, Inc. was wholly owned by a Delaware corporation. Sitelines and its parent corporation had been represented by their attorney of record, Raymond A. Greenberg, Esq., in a civil action entitled Manarra v. Sitelines, Inc. et al. After trial in the matter, the parent corporation was exonerated of liability, but judgment was rendered against Sitelines, Inc. on October 30, 1979.

Greenberg concluded that Sitelines was judgment-proof, and his clients relied upon his advice not to pay the outstanding judgment.

In August 1980 Appellants caused a letter with attachments to be sent to Sitelines, Inc. The letter and attachments referred to Chapter 13 bankruptcy procedures, which is not a remedy available to corporations.

After receiving Appellants' letter, the officers of the parent corporation concluded that their assets could be

attached. Contrary to their own attorney's advice, they decided to pay the judgment.

The Hearing Panel and Review Department found that because Sitelines' guardian's assets could not be attached andbecause of the reference to Chapter 13 Bankruptcy, Appellants' letter contained materials which was false, deceptive or which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2).

B. The "Roman" Matter

In about April 1980, Lawrence L. Roman was provided with a copy of a letter Appellants caused to be sent to his client, Anna Russo. The letter included an enclosure entitled "Order for Debt Relief." Roman believed the letter implied that: (a) service would be provided by Appellant for the total amount of $60; and (2) the proposed "plan" referred to something other than bankruptcy. Roman called Appellants' office, and was told by

an attorney that the proposed "plans" could be akin to bankruptcy, depending on whether one filed under Chapter 11 or Chapter 13. The attorney also told Roman that, in addition to the $60 filing fee, attorneys' fees in the amount of $600 would be charged.

The Hearing Panel and Review Department concluded that the letter and enclosures contained matter which was false, deceptive, or which tended to confuse, deceive or mislead because the service would not be provided for $60 and because the word "bankruptcy" was not disclosed by Appellants.

C. The "Wagstaff" Matter

In 1979, William A. Wagstaff was a defendant in a Los Angeles Municipal Court action. His attorney of record was James V. Jordan, Esq. At a time when the plaintiff in that action had filed a motion for summary judgment and Jordan had opposed said motion on Wagstaff's behalf,

but prior to the hearing on the motion, Appellants sent a letter to Wagstaff. Plaintiff's motion for summary judgment was denied.

The Hearing Panel and Review Department concluded Appellants' letter and attachments contained matter which was false and deceptive or which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2), in that contrary to the true facts, the letter falsely suggests that the natural result of the civil action would be a judgment adverse to Mr. Wagstaff and execution upon his assets.

D. The "Parayno" Matter

In April 1978, Fidela G. Parayno was served with Summons and Complaint for Specific Performance. Thereafter, Parayno retained counsel, Charles J. Tarr, who filed an answer on her behalf. On or about February 21, 1979, while the court file in Parayno's case indicated that the matter was at issue,

Appellants sent a letter with enclosures to Parayno.

Upon receipt of petitioners' letter, Parayno became extremely upset and concerned. The letter caused her to question whether Tarr was adequately representing her interests. She felt that she was in imminent danger of losing her property.

The Hearing Panel and Review Department concluded that Appellants' letter to Parayno contained matter which was false or deceptive or which tended to confuse, deceive or mislead, in that the natural course of said civil action did not conform to petitioners' implication that judgment would be rendered against Parayno and her assets would be executed upon.

E. The "Main" Matter

In about 1979, judgment was rendered against Jerral W. Main in a civil action filed in Los Angeles Superior Court. Between the date of entry of

judgment and July 1980, Main voluntarily paid the sum of $42,000 to the plaintiff pursuant to a stipulated payment schedule. In about July 1980, Main received a letter with attachments from Appellants. Main became extremely upset upon his receipt of the letter. He contacted the plaintiff's office and was told that they had not executed on his property pursuant to a writ of execution, nor did they intend to. Main telephoned Appellants' office and was told by a female employee that although she did not know the specifics of his case, the statements contained in Appellants' letter were true. In fact, the plaintiff did not attempt to execute on Main's property, nor was any of Main's property attached. Main ultimately voluntarily completed satisfaction of the outstanding judgment.

The Hearing Panel and Review Department concluded Appellants' letter with attachments contained matter which was

false or deceptive or which tended to confuse, deceive or mislead, in violation of Rule 2-101(A)(2). The Hearing Panel and Review Department also concluded Appellants' letter with attachments was transmitted to Main in a manner which involved intrusion or threats, in violation of Rule 2-101(A)(6).

E. The "Sims" Matter

In late 1978, Valerie Keen Sims rented an automobile at her employer's request; the latter subsequently refused to pay for the rental charges. Sims was sued by the rental company in a Los Angeles Municipal Court action. She allowed judgment in the amount of $420 to be entered against her on February 13, 1979, intending to seek subrogation from her employer. Sims did sue her employer on February 10, 1979, and thereafter accepted the sum of $1000 in settlement of her claim.

On or about March 15, 1979, Sims received a letter with attachments from Appellants. The letter was sent to Sims' place of employment, and consistent with office procedures, her employer opened and read the letter. Sims' employer became very upset over the possibility that Sims' wages could be garnished, was concerned that Sims had financial problems which could affect her trustworthiness, and instructed Sims to take care of the matter.

Sims immediately telephoned Appellants' office. Sims informed a woman who identified herself as a secretary in Appellants' office that the letter was inaccurate, that Appellants should not contact her in the future, and that she considered Appellants' letter to be an invasion of her privacy.

A few weeks later, Appellants sent a second letter to Sims at her residence. Sims' husband saw the letter and became

extremely angry. He interpreted the letter to mean that the civil action against his wife had not been settled, that Appellants were bringing to Sims' attention additional problems which had developed in the action, and that his wife was lying to him. He left the family residence for three days.

The Hearing Panel and Review Department concluded Appellants' letters to Sims contained matter which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2). Further, Appellants' letters were transmitted in a manner which involved intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct, in violation of Rule 2-101(A)(6).

G. The "Daisy" Matter

In or about March 1978, Daisy of California ("Daisy"), a California corporation, was sued in the Los Angeles

Municipal Court. On or about May 24, 1978, an Answer to the Complaint was filed by Daisy.

Trial was scheduled in said matter for November 17, 1978. By Stipulation of the parties on November 17, 1978 the matter was taken off the calendar and re-scheduled for trial on January 29, 1979.

On or about November 28, 1978, the parties entered in the court file a stipulation taking off calendar plaintiff's Motion to Strike and Motion for Default. By November 28, 1978, the parties had agreed not to seek a default judgment against Daisy, and the parties had entered into serious settlement negotiations.

Thereafter, Appellants' letter dated November 29, 1978 was received at Daisy's office.

The president of Daisy read the letter and interpreted it to mean that the plaintiff was obtaining a default judgment

against Daisy, and that something of which he was not aware had occurred in the action. In fact, the true status of the action was not as represented in petitioners' letter.

The Hearing Panel and Review Department concluded Appellants' letter to Daisy contained matter which was false or deceptive or which tended to confuse, deceive or mislead in violation of Rule 2-101(A)(2).

The California Supreme Court after its independent review of the record held that each of the letters violated Rule 2-101(A)(2) in that each of the letters had a likelihood of misleading the public and actually did mislead the public.

The California Court also concluded that Rule 2-101(A)(3) was violated because the letters omitted facts necessary to make the letters not misleading (i.e. the letter stated that $60 is needed to apply for debt relief but fail to state that

Appellants will charge 10 times that amount in attorneys' fees. (See AJS, p. 20A and 21A.)

Further, the Court upheld the findings in the Main and Sims matters that the format in which Petitioners presented their letters involved intrusion, threats and intimidation in violation of Rule 2-101(A)(6). Although recognizing that the transmission of commercial speech by mail is entitled to constitutional protection, the Court concluded that particularized, misleading and unsolicited letters mailed to defendants against whom cases were then pending was bound to cause panic and fear in lay recipients (AJS, page 21a).

Finally, the Court concluded the letters violated Rule 2-101(A)(4) because they failed to clearly identify themselves as a communication concerning the availability of Appellants' law firm

for professional employment, thus omitting material facts.*

II

ARGUMENT

THE OPINION BELOW WAS DECIDED IN A WAY CONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT AND PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT.

A. RULE 2-101(A) IS ON ITS FACE CONSTITUTIONALLY VALID.

Under the law of this land, misleading advertisements may be restrained. See Virginia State Board of Pharmacy v. Virginia Consumers Council 425 U.S. 748, 96 S.Ct. 1817 (1976); Bates

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* All Justices concurred in the conclusion that Rule 2-101(A)(2) (misleading statements) was violated. Bird, C.J., dissented from the conclusion that there was a violation of Rule 2-101 (A)(3) (failure to state attorneys fees would be charged; Bird and Kaus dissented as to the finding Rule 2-101(A)(4) (failure to identify the letters as a communication seeking professional employment) had been violated. Grodin, J. dissented only as to the conclusion that Rule 2-101(A)(6) (intrusive communications) was violated.

v. State State Bar of Arizona 433 U.S. 350, 97 S.Ct. 2671 (1977); In re Primus 436 U.S. 417, 98 S.Ct. 1893 (1978); In re RMJ 455 U.S. 191, 102 S.Ct 929 (1981); Zauderer v. Office of Disciplinary Counsel _____U.S.____ 105, S.Ct. 2265 (1985).

As to the validity of restricting misleading commercial speech, in fields other than the legal profession, see Friedman v. Rogers 440 U.S. 1, 99 S.Ct. 887 (1979); Central Hudson Gas v. Public Service Commission of New York 447 U.S. 557, 100 S.Ct 2343 (1980).

Clearly Rule 2-101(A) on its face is constitutional and Appellants apparently so concede (AJS, page 12). The restraints it places on lawyer advertising are, we submit, as limited as any rule now existing, or proposed, in the United States.

Rule 2-101(A) prohibits communications seeking professional employment

only if: (1) they contain untrue statements; (2) they contain matter or present matter in a format that is false or deceptive or which tends to confuse, deceive or mislead the public; (3) they omit any fact necessary to keep the statement from being misleading to the public; (4) they omit a statement that the communication is in fact a communication (i.e. failure to make clear that the communication is in fact an advertisement) if such fact is not clear from the context of the statement; (5) they hold the lawyer out as a certified specialist unless he is in fact so certified by the California Board of Legal Specialization; or (6) they are transmitted in a manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

B. AS APPLIED TO APPELLANTS' CONDUCT IN THIS MATTER RULE 2-101(A) WITHSTAND CONSTITUTIONAL CHALLENGE.

This Court has emphasized that attorneys who question the regulation of advertising are required to show that their particular advertisements are constitutionally protected speech.

In answer to the contention that an overbroad regulation of lawyer advertising might serve to chill protected speech,* the Court stated:

> "But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in Virginia Pharmacy Board vs. Virginia Consumer Council, 425 U.S. at 771 n.24, 96 S.Ct. at 1830, there are 'common sense differences' between commercial speech and other varieties. See also id. at 775-781, 96 S.Ct. at 1832-1835 (Concurring Opinion). Since advertising is linked to

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* Appellants also argue that Rule 2-101 is, in effect, overbroad and has a chilling effect on lawyer advertising. (AJS, p. 12)

> commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See id. at 771-772 n.24, 96 S.Ct. at 1830-1831. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Ibid. Since overbreadth has been described by this court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' (citation omitted) we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." (Emp. added.) (433 U.S. at 380-381, 97 S.Ct. at 2707-2708.)

Thus, in the context of commercial speech, the overbreadth doctrine is unavailable to attorneys challenging the validity of regulations on such speech. They must challenge the regulation as it applies to their conduct.

Appellants are, therefore, limited to challenging Rule 2-101 as it is applied to their own conduct.

Before discussing what that conduct was, it might be well to note what it was not!

It was not the publication of a general advertisement of legal services in magazines, newspapers, telephone books, pamphlets or on radio or television, nor the general availability of legal services along with representative fees that as was considered in Bates; it is not the publication of advertisements setting forth limited or specific areas of legal practice; nor the mailing of announcement cards to other than limited classes of person as was considered in In re RMJ; it is not the solicitation of persons with specific legal problems by a nonprofit charitable organization for the purpose of bringing litigation to establish constitutional rights as was considered in Primus; it is not the general publication in a newspaper of an advertisement addressed to persons with

certain legal problems as was considered in Zauderer.

What was done here was the mailing of hundreds of thousands of letters to specific individuals purporting to inform and advise each individual about his or her particular legal problem, which information and advice, because it was incorrect as to that individual, resulted in that person being misled.

The Supreme Court of California has found that petitioners' advertising letters directed to seven specific persons and purporting to be about their particular legal problems misled those persons who received them. The record fully supports these conclusions and the facts on which the conclusions are based were stipulated to by the parties.

In the Sitelines matter a parent corporation which had been exonerated of liability after trial and which after advice of its own counsel had determined

it had no liability for judgment against a subsidiary corporation received Appellants' letter referring to Chapter 13 Bankruptcy (which was not available in any even to either corporation) and concluded, contrary to its own counsel's prior advice, to pay the judgment. In the Roman matter, an attorney whose client had received one of Appellants' letters believed that whatever service Appellants would perform would only cost $60 and that Appellants' "plan" referred to something other than bankruptcy. When he called he learned the "plan" was indeed bankruptcy and the cost was $660. In the Wagstaff matter defendant Wagstaff was represented by counsel in a proceeding in which plaintiff filed a Motion for Summary Judgment. Appellants, before the Summary Judgment Motion was heard, mailed to Wagstaff a letter falsely suggesting that the natural result of the civil action would be a

judgment adverse to Wagstaff. The motion for Summary Judgment was denied. In the Parayno matter, Parayno was represented by counsel in an action for specific performance. She received Appellants' letter falsely suggesting that the natural course of the action would be a judgment against Parayno and execution against her property. She became extremely upset and thought her lawyer was not representing her interests properly. In the Main matter a $59,000 Judgment was entered against Main and Main had voluntarily paid $42,000. He received Appellants' letter saying that a writ of execution had been issued against him. Main became upset and called the creditor who informed him that they did not intend to execute on his property. Main called Appellants' office and was told Appellants' letter was correct but if he wanted more information he could come in for an appointment. Appellant

did not go in Appellants' office and in fact the creditor never did attempt to execute on Main's property. In the Sims matter a judgment was entered against Sims for $420. She obtained subrogation from a third party who had the ultimate liability. Thereafter her employer opened a letter to her from Appellant. The employer thought Sims did not pay her bills and instructed Sims to take care of the matter. Sims phone Appellant and informed them the statements in their letter was inaccurate, that she considered their letter an invasion of privacy and she wanted no more. Two weeks later, Appellants wrote a similar letter to Sims at her home. Sims' husband read it and was convinced his wife was lying to him about settlement of the underlying action. He left home for three days. In the Daisy matter Daisy Corporation was defendant in a civil action in which

serious settlement negotiations were underway when Appellants' letter arrived. Daisy's president read the letter and interpreted it to mean a default was being taken against Daisy (the letter stated ". . . [Plaintiffs] are asking the Court to declare you in default and order a judgment against you. The next step is to have the Court issue a writ of execution against you"). (See AJS, page 66a.) In fact, this was not the true status of the Daisy matter.

In substance, in their letters Appellants purported to know all about the recipients' particular factual situation and legal problem when in fact they knew nothing. This was misleading.

The parties acknowledged in the Stipulation that there may be other instances involving similar facts, however, the production of evidence relating to those facts would be cumulative.

So far as we are aware there are no decisions by this Court or any other court holding that misleading communications are protected by the First Amendment, and this is so whether the number of recipients who are misled as well as "confused or frightened" by such communications is large or "atypical".

The truth remains that some recipients of Appellants' particularized letters were misled and suffered harm. Moreover, petitioners should have been aware that their particularized mass mailing campaign would be incorrect as to many recipients and might mislead others.

Both as a protector of the consuming public and as an enforcer of ethical standards for lawyers, the Supreme Court of California has authority to prevent misleading advertising by lawyers. Nor does the validity of such restraints require that any rule containing them set

forth any and all factors that might mislead. Appellants and any reasonable person should be aware that many lay people, upon receiving a letter from a lawyer, will believe the particular statements in that letter purportedly addressed to the recipient's own legal problems, and will rely thereon sometimes to their detriment. Appellants sent the letters and only they can be responsible for the content. The letters were intended to cause some reaction in the recipients and they did. Appellants should not now be permitted to claim that the reaction was the over reaction of "panicky" people.

Lawyers who advertise by mail to particular individuals, purporting to advise them about their specific legal problems should have the responsibility of insuring that mail's accuracy. Such lawyers should also have the responsibility of making certain that all

facts necessary to prevent the letters from misleading that particular individual are contained in the letter, or the letter should not be sent.

We are not talking here about general advertisements, clearly labeled as such, that may be sent to a particular recipient. Most lay people would understand that the allegations in a general advertisement may or may not apply to them and can make their own decision about replying to the advertisement. In accord with this Court's other decisions in relation to attorney advertisements, "more information" not less should be the goal. That is the purpose of Rule 2-101(A) and it is the purpose of the requirement in the decision below that mass mail advertisements contain appropriate disclaimers or clarifying language. Is that too much to ask?

III

CONCLUSION

For the foregoing reasons, Appellee respectfully moves the Court to dismiss this Appeal, or in the alternative, to affirm the judgment entered in the case by the Supreme Court of California.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, certifies that three copies of the MOTION TO DISMISS OR AFFIRM have been served on counsels of record for the parties herein by mailing same, first-class postage prepaid, this the 24th day of January 1986, as follows:

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No. 85-1091

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANDREW LEONI AND HOUSTON SLATE,
Appellants,

v.

THE STATE BAR OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Appellee's motion to dismiss or affirm is primarily taken up with an effort to recast the facts of this case so as to avoid the substantial constitutional problems raised by appellants. The State Bar seeks to portray this as a run-of-the-mill case involving advertisements that were deceptively phrased. In fact, however, this portrayal is neither accurate in itself nor a fair description of what the California Supreme Court concluded about appellants' letters. That court ruled against appellants because it believed that it is constitutional to hold an author of a "personalized" commercial solicitation responsible whenever even a single consumer is confused by his letter—regardless of the level of the harm or the justifiability of the confusion—at least where the court can, after the fact, think of some phrasing that might have alleviated the problem. This constitutional analysis is fundamentally flawed.

1. The State Bar asserts repeatedly that this case involves written solicitations that contained false advice, or contained an implicit message that was inaccurate with respect to particular readers. The reality, however, is quite different. While there is no doubt that a few consumers were confused and/or unduly concerned after reading the letters, it simply is not true that these reactions can be tied to deceptive phrasing in the letters.

What appellants set out to do in these letters was to provide accurate information about how the legal system works in cases involving small debts. They described some of the outcomes that can result from neglecting a lawsuit and outlined some of the possible options, including Chapter 13 of the Bankruptcy Code. Appellants noted that, far from researching the reader's particular case, they had simply drawn the name from a court list. They then urged persons who had retained counsel to consult with their attorneys, and offered to provide free advice to persons who lacked representation.

It is clear, therefore, that the minor harms experienced by the seven complainants in this case occurred not because of, but *despite* the actual phrasing of the letters. Several persons, for example, simply were concerned that their lawyers had not taken appropriate steps to prevent a judgment or execution, even though the letters in no way implied that this was true.[1] In another case, a corporation decided to ignore the advice of its lawyer and pay a judgment entered against a judgment-proof subsidiary. Yet the letters said nothing at all about a corporation's liability for subsidiaries.[2] In one case, the harm apparently resulted, not from any statement in the letter, but from the fact that persons other than the addressee read the letter and learned about the pendency of a lawsuit.[3] In still another, the letter accurately

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[1] App. 9a-10a.

[2] App. 8a-9a.

[3] App. 11a.

reported that a recipient's opponent had obtained a writ of execution—a fact theretofore unknown to the recipient—and the only criticism was based on the fact that the plaintiff had decided to defer the use of that writ.[4]

2. In sum, the court below had good reason for deemphasizing any focus on what appellants actually said,[5] and looking only at effects. It relied mainly on the theory we described in the jurisdictional statement—that a letter may become "misleading" and thus subject to suppression if one or a few readers are *in fact* confused. In the court's view, such occasional confusion, when it occurs, is by itself a sufficient basis for punishing those who distribute personalized solicitations, at least where, after the fact, the court can think of a further disclosure or disclaimer that would have been better. This approach would mean the effective elimination in California of any efforts to reach potential clients through personal letters.

When appellee finally faces up to the issue decided below, it wholeheartedly endorses the approach just described. The Bar states flatly that any lawyer who advertises by mail to particular individuals has the responsibility to ensure total accuracy and to ensure the inclusion of every fact needed to prevent the confusion of even one reader. Br. at 35-36.[6] It would not require

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[4] App. 10a-11a.

[5] The court rejected any reliance on the theory that the letters were *false*. App. 21a-22a. It did find that two particular passages in some of the letters contained misleading omissions. But the main holding below was based entirely on the general nature of the letters as personalized solicitations aimed at persons who had been sued. Moreover we have already discussed in the jurisdictional statement, at 23-25, the reasons why the two specific findings of omissions cannot support the court's judgment.

[6] The Bar would apparently limit this requirement to letters "purporting to advise [readers] about their specific legal problems." Br. at 35. But in view of the Bar's willingness to find such particularized advice in appellants' letters—letters which simply laid

any showing that a substantial *number* of persons were confused, or that the confusion resulted from a deceptive *phrase* in the letter.

As we have pointed out, this Court has flatly rejected such an approach in two cases involving other kinds of lawyer advertising. *Bates v. State Bar of Arizona*, 433 U.S. 350, 373 n.28 (1977); *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2276 n. 9 (1985). These cases each involved types of advertising that would predictably cause some confusion to some persons, but the Court held that this fact provided an insufficient basis for suppression of a whole category of commercial speech. It held that these kinds of problems should instead be minimized through mandated disclosures or disclaimers.

The State Bar does not dispute our analysis of *Bates* and *Zauderer*. Instead, it seems to argue that a different rule should apply here merely because the letters at issue were "solicitations" in the sense that they were personalized and made reference to the fact that the recipient was a defendant in an ongoing lawsuit. Br. at 35-36. There is no basis for such a distinction.

First of all, written solicitation letters do not, merely by virtue of the fact that they are addressed to particular people, raise all of the concerns associated with in-person solicitation of clients. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In fact, written solicitations are much more comparable to general advertisements. Here, for example, appellants' decision to use letters—rather than general advertisements discussing the same legal issues—probably made no difference at all in the effects caused to most of the complainants. If appellants had sent the same message to the same people in the form of a generalized advertisement, there could

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out various possible options and urged readers to see a lawyer if they had not already done so—this qualification provides little or no reassurance.

have been the same number of readers who misread the ad and reacted with confusion or fear about the status of their own particular case.[7] *Bates* and *Zauderer* make clear that this kind of occasional confusion provides no basis for suppression of advertisements, particularly since the problem generally will be cleared up as soon as the consumer speaks to an attorney. Since the potential for confusion is fundamentally no different in a case involving personalized letters, and that confusion can be cleared up in precisely the same fashion, we see no basis for applying a different rule in that context.[8]

More importantly, any perceived differences between general advertisements and written solicitations can be eliminated through the very regulatory approach suggested in *Bates*—mandated disclaimers or disclosures. While the inclusion of mandatory language in a solicitation letter may not be enough to ensure the total prevention of all consumer confusion, it can effectively eliminate any reason for concern that the letter *format* will cause undue reliance by readers. If a state were to require an "advertisement" label on every such letter, and/or a statement disclaiming any knowledge of the reader's individual case, it could effectively cause every

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[7] To be sure, with personalized solicitations, there is some additional danger that a letter will cause readers to believe that the lawyer has analyzed their case and is giving them his advice. But at least where the letter does not make any claim to be based on knowledge of an individual case, this confusion is no different in principle from the kinds of consumer confusion discussed in *Bates* and *Zauderer*.

[8] We note, in this regard, that all seven of the complainants were among those recipients who were already represented by counsel. In only one case did a complainant actually do anything in reliance on his understanding of the letters—*i.e.*, in the Sitelines matter, where a company somehow drew the conclusion that it should pay a judgment for a judgment-proof subsidiary. In every other case, where letters led readers to have concerns about the handling of their cases, it appears that they simply expressed their concerns to their own counsel and were reassured.

consumer to view the letter as comparable to a generalized advertisement of legal services.

The approach adopted below, by contrast, requires the letter writer to (1) avoid even one instance of consumer confusion, or (2) anticipate every possible disclaimer or disclosure that a court might conjure up after the fact. Such a regulatory approach, while formally less restrictive than an outright ban on written solicitations, is actually no different. Even now, lawyers in California do not know what they have to say in order to undertake a letter campaign similar to appellants'. Certainly the State Bar has not included any specific suggestions in its brief. The resulting chill on free speech will lead to precisely the outcome foreclosed by *Bates* and *Zauderer* —an effective prohibition of a category of truthful commercial discourse based on a concern about minor harms caused to a few consumers who will misread what is written to them.

CONCLUSION

For these reasons, the Court should note probable jurisdiction and reverse the judgment below.

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